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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer



AND

Exchequer Chamber.

By ROBERT PHILIP TYRWHITT, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE;

AND

THOMAS COLPITTS GRANGER, Esq.

BARRISTER AT LAW, OF THE INNER TEMPLE.

“ Ejus (*Analogiæ*) hæc vis est, ut id quod dubium est ad aliquid simile de quo non quæritur, referat ; ut incerta certis probet.”

Quinct. Inst. Orat. lib. i. c. 6.

FROM MICHAELMAS TERM, 6 WILLIAM IV. 1835, TO
TRINITY TERM, 6 WILLIAM IV. 1836;

BOTH INCLUSIVE.

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AND

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1837.

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COURT OF EXCHEQUER OF PLEAS,

*From Michaelmas Term 1835 to Trinity Term 1836,
both inclusive.*



The Right Hon. JAMES Lord ABINGER C. B.

The Right Hon. Sir JAMES PARKE, Knt.

The Hon. Sir WILLIAM BOLLAND, Knt.

The Hon. Sir EDWARD HALL ALDERSON, Knt.

The Hon. Sir JOHN GURNEY, Knt.



ATTORNEY-GENERAL,

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL,

Sir ROBERT MOUNSEY ROLFE, Knt.

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CORRIGENDA AND ADDENDA.

Page 126, line 17, *for* " that" read " a."

18, *after* " inducement" add " a comma."

27, *dele* " but."

128, line 9 from bottom, *for* " Co." read " Son."

137, line 18 of marginal note, *after* " money" read " within six years."

32, 33 of same, *dele* " such declarations" and insert " which."

34 of same, *after* " been" read " made."

153, line 3, *dele* " that."

421, marginal note, add " Bail who move to set aside proceedings against them on the ground of their discharge, by giving time to the defendant, must come in a reasonable time; and where the proceedings were commenced in Michaelmas term, it was held too late to move in Hilary term following."

975, line 27 of marginal note, *after* " for" read " the defendant."

999, n. (a), line 2, *for* " G. 4." read " W. 4."

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

PINNER *against* ARNOLD and Another.

1835.

ASSUMPSIT for goods sold and delivered, &c.

This was an action to recover the balance of an account for making a copper-plate printing-press, and at the trial before *Gurney* B. at the *Westminster* sittings after the last *Trinity* term, the plaintiff offered in evidence the following agreement, which was unstamped :—

An agreement to make a printing-press is within the exemption in the stamp act 55 G. 3. c. 184. schedule, tit. Agreement relating to the sale of goods, and does not require a stamp.

“ Agreement between Mr. *Pinner*, press-maker, on the one part, and Messrs. *Arnold* and *Fisher*, copper-plate printers, on the other part. Oct. 19, 1833.—I hereby agree to make for Messrs. *Arnold* and *Fisher*, a very superior grand *Eagle* press, iron frame, with fly-wheel motion on the top roller, for the sum of 90*l.* to be complete and perfect ; Messrs. *Arnold* and *Fisher* agreeing to pay 40*l.* by instalments of 5*l.* in advance, up to the

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delivery of the press, the remainder to be paid in six months. The press to be ready within three months from the date of this agreement. The press to be warranted for twelve months. D. PINNER."

It was contended on the part of the defendants that this agreement should have been stamped, it not being an agreement relating to "the sale of any goods, wares, or merchandize," within the exemption in the stamp act, 55 G. 3. c. 184. schedule, tit. Agreement; the learned judge, however, admitted it in evidence, and the plaintiff had a verdict, with leave for the defendant to move to enter a nonsuit, in case the court should be of opinion that the agreement ought to have been stamped.

Chilton now moved accordingly. This case is distinguishable from *Wilks v. Atkinson* (a), and *Hughes v. Breeds* (b), which were relied upon by the other side at the trial, and falls within *Buxton v. Bedall* (c). In that case, as in the present, nothing was said as to putting up the machine, but the putting up is incidental to both agreements, and plaintiff came again and again to put up and adjust the printing-press. [*Parke* B. What is but a contract for the sale of goods? The point was decided in *Wilks v. Atkinson*.] There seems to be a connection between the statute of frauds and the exemption in the stamp act, and the legislature appears to have intended that agreements which are required by the former to be in writing shall be stamped. [*Parke* B. The way in which the two statutes seem to be connected is this: where agreements are held to be within the statute of frauds, it is from their being agreements relating to the sale of goods, and if so, they are equally within

(a) 6 Taunt. 11.

(b) 2 Car. & P. 159.

(c) 3 East, 303.

1835.



PINNER

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the exemption of the stamp act.] In *Groves v. Buck* (a), a contract for oak pins which were not then made, was held not to be within the statute of frauds, and here the subject-matter of the contract does not exist, but it is an agreement for the making of goods. [Lord Abinger C.B. You say that the plaintiff could not have bought a press ready made for the defendant, but undertakes to make him one. Parke B. Still that would only be a contract for the sale of goods made by himself. How was the press fixed?] There was no precise evidence as to that. In *Hughes v. Breeds* (b), Lord Tenterden recognises the distinction between the sale and the making of goods. In *Wilks v. Atkinson* (c), the rape oil had only to be expressed, but in the present case, as in *Buxton v. Bedall* (d), there were many constituent parts to the machine. [Parke B. The distinction taken is this: if you employ a tailor to repair a coat, his remedy is for work and labour, but if to make one, his action must be for goods sold and delivered.]

LORD ABINGER C. B.—I was counsel in *Buxton v. Bedall*: the decision was thought a very doubtful one at the time, and modern cases seem to have overruled it. If a man engages to sell goods made by himself within a certain time, it is still a contract for the sale of goods. I think the present case falls within the recent decisions, and that this agreement does not require a stamp.

PARKE B.—I am of opinion that this is nothing more than an agreement to sell a press. If it had appeared either by the agreement or by the evidence that the press was to be fixed, then I should have considered that it was not within the statute of frauds, but

(a) 3 M. & S. 178.

(b) 2 Car. & P. 159.

(c) 6 Taunt. 11.

(d) 3 East, 303.

1835.

Garbutt v. Watson
Arnold and Another

there is not any thing in the case to show that this was to be done, and the plaintiff could fulfil his contract without giving the press the character of a fixture. *Burton v. Bedall* has been over-ruled both by *Garbutt v. Watson* (a) and *Hughes v. Breeds* (b).

ALDERSON B. and GURNEY B. concurred.

Rule refused.

(a) 5 B. & A. 613.

(b) 2 Car. & P. 159.

HUGHES against HUGHES.

Where a plaintiff recovered 13s. damages in an action of trespass *quare clausum fregit*, to which only the general issue was pleaded, it was held that he was entitled to his full costs, as under that plea, as restricted by the rules of pleading of *Hilary* term, 4 W. 4., the freehold could not come in question; so that the judge might certify under the 22 & 23 Car. 2. c. 9. s. 136. in order to ensure the plaintiff his costs.

TRESPASS *quare clausum fregit*. Plea, the general issue. At the last summer assizes for the county of *Carmarvon*, the plaintiff obtained a verdict, damages thirteen shillings. The judge, on being applied to, refused to certify for costs under the 22 & 23 Car. 2. c. 9. s. 136. (extended to *Wales* by the 11 & 12 W. 3. c. 9.) The master afterwards in taxation allowed the plaintiff his full costs. *Welsby* having obtained a rule why the master should not review his taxation, and allow the plaintiff no more costs than damages,

J. Jervis now showed cause. This rule was obtained on the ground that under the 22 & 23 Car. 2. c. 9. s. 136, the plaintiff is entitled to no more costs than damages, but it has long been settled that where the freehold cannot come in question at the trial, that the statute does not apply. In this case the only plea on the record is the general issue, which, according to the rules of Court of *Hilary* term, 4 W. 4. only operates as a denial that the defendant committed the trespass alleged, and under it no question as to the freehold can

be raised. On the application for the rule, it was said that the effect of this restriction of the general issue is indirectly to repeal the 22 & 23 Car. 2. c. 9, and the 11 & 12 W. 3. c. 9, but by the 3 & 4 W. 4. c. 42, s. 1, authorizing the judges to make rules regulating the mode of pleadings, such rules are to have the like force as if enacted by parliament. [*Parke B.* We have no power under that act to repeal any statute, we are only authorized to make rules as to pleading, which may repeal a statute in effect.]

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Welsby in support of the rule. The question is, whether the judges have power to repeal the 22 & 23 Car. 2. [*Alderson B.* Suppose the judges had said that under the general issue a licence might be given in evidence, would that have been repealing the statute?] The cases having established that where it appears on the face of the plea that the freehold has come in question, or where the plea is such, that it could not come in question, the statute does not apply, the effect of the new rule with respect to the general issue, as contended, for on the other side, will be wholly to repeal the act, for both under the plea of *liberum tenementum*, and the general issue, a judge's certificate will be unnecessary. [*Parke B.* Supposing the plea to be that the close is not the plaintiff's, you cannot say that the freehold may not come in question, so that the statute may still have some operation.] Allowing that the judges have power to alter the act of *Charles 2*, yet the recent rule as to the general issue does not sufficiently refer to the statute to affect it. They are not in *pari materia*. The act is for the prevention of vexatious and frivolous suits, and in the present action it appeared in evidence that the defendant, previous to the issuing of the writ, tendered 3*l.* in compensation, while at the trial the plaintiff only proved damages to the extent of

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HUGHES
HUGHES.

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18s., so that the case is both within the letter and spirit of the statute. [*Alderson* B. It is stated in *Hullock on Costs*, p. 37, that the act did not originally receive the construction afterwards put upon it.]

PARKE B.—The question is, whether we shall abide by the more modern decisions by which the statute has been narrowed; and although regret has often been expressed at their having departed from the older cases, we must be bound by them. They have established that where the plea distinctly shows that the freehold could not come in question, the statute does not apply; now by the new rules of pleading a different meaning has been given to the general issue in trespass. Formerly when it was pleaded the freehold might have come in question, so that the judge might have certified, but since the recent rules it cannot.

The other Barons concurred.

Rule discharged (a).


(a) See *Smith v. Edwards*, K. B. Mich. 1835.

WITHAM *against* GOMPERTZ.

In an action by an indorsee against the drawer of a bill of exchange, it is not necessary in the affidavit of debt to aver either presentment to the acceptor, or notice of dishonour to the drawer.

IN this action *Bolland* B. had made an order to discharge the defendant out of custody, upon entering an appearance, on account of the affidavit of debt being defective. The following is a copy of the affidavit: “ *F. W.* of &c. clerk to *W. W.* of &c. maketh oath, &c. that *H. G.* is justly, &c. indebted to the said *W. W.* in 250*l.* for principal money due to the said *W. W.* as indorsee of a bill of exchange drawn by the said *H. G.* on Mr. *G. P.* for the payment of the said

sum of 250*l.* to the order of the said *H. G.* at a day now past, and by the said *H. G.* indorsed to the said *W. W.*, and which said bill hath been refused payment by the said *G. P.*" *Humfrey* having obtained a rule to rescind the learned Baron's order,

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 v.
 GOMPERTZ.

Wordsworth now showed cause. This affidavit is defective in several particulars. The action being by the indorsee against the drawer of a bill of exchange, the affidavit should have shown that the bill had been presented for payment when it came due. There is also no averment of notice having been given to the drawer that the bill had been dishonoured. [*Parke B.* It was held in *Weedon v. Medley* (a), that such an averment is unnecessary. I have frequently refused to discharge a party on common bail, where the defect alleged has been the want of an averment of notice.] Neither does the affidavit state that the bill is now over-due and unpaid, which is a material omission. *Simpson v. Dick* (b). This is a stronger case, for there it was averred that the sum remained due and owing; whereas here there is no averment at all that the amount of the bill is either unpaid or due.

Humfrey in support of the rule. This affidavit follows the precedent given in *Tidd's Forms*, which has been acted upon for many years, and which only avers a refusal by the acceptor to pay. In *Buckworth v. Levy* (c), the affidavit did not mention the acceptor or his default at all. [*Alderson B.* You must show a debt on the part of the drawer, and his debt does not arise until after the default of the acceptor.] Neither does the indorsee's right of action arise until the refusal of payment by the acceptor and notice to the drawer, yet it has been

(a) 2 Dowl. P. C. 689.

(b) 3 Dowl. P. C. 731.

(c) 7 Bing. 251.

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held that it is not necessary to aver notice; *Wesdon v. Medley*. (a) [Lord Abinger C. B. The statute requires an affidavit showing a debt, but your affidavit may be true in all its facts and still you may not be entitled to recover against the drawer. Parke B. There is certainly a difficulty in deciding that although an averment of notice is not necessary, one of presentment is; for as presentment and notice are equally requisite to entitle an indorsee to recover against the drawer, you should take both steps or neither in the affidavit.] It would be attended with great inconvenience to hold that a presentment must be alleged, as in many cases an indorsee could not himself swear to the fact, and a separate affidavit to speak to it would be required. [Lord Abinger C. B. Can you make it appear that a man could be indicted upon this affidavit for perjury? Alderson B. The question is, whether you do not *prima facie* show a debt by showing the default of the acceptor.]

LORD ABINGER C. B. (after consulting with the rest of the bench.) My learned brothers are of opinion that the affidavit is sufficient, and it appears from Mr. Tidd's work that this form has long been used in practice, but I certainly should have thought that it was necessary to aver a presentment.

PARKE B. It is better to abide by the form that has been usually followed, for I do not know where we are to stop if we once hold, that in the affidavit of debt you must go into all the special circumstances which it may be requisite to prove in evidence, in order to entitle a party to recover upon a bill of exchange. I am inclined to think that the person making this affidavit could be indicted for perjury, if it could be shown that

(a) 2 Dowl. P. C. 689.

he knew there had been no presentment, or was aware of some circumstance whereby the liability of the drawer had been discharged.

1836

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 v.
 GOMPERTZ.

ALDERSON B.—I think we should adhere to the precedent which has been acted upon for so many years. I am still of the opinion I expressed in *Weedon v. Medley*, that some authority ought to be produced to induce us to depart from the usual form.

BOLLAND B. concurred.

Rule absolute.

LIDDARD *against* HOLMES.

ASSUMPSIT for money had and received, and on an account stated. Plea, the general issue. The cause was tried before the under-sheriff of Kent, by virtue of a writ of trial, and it appeared in evidence that the plaintiff and the defendant had been appointed co-surveyors of the parish of *Knockholt*, in *Kent*, in *October* 1832, and that the rate-book had been delivered to the plaintiff, who proceeded to collect the rates and expend them upon the roads of the parish up to *January* 1833. Some dissatisfaction having been expressed with the plaintiff at a vestry meeting in that month, he agreed to give up the rate-book to the defendant, on condition that the latter should, out of the rates to be received by him, pay the plaintiff the balance due to him, which was proved at the trial to be 15*l*. The rate-book was accordingly delivered to the defendant, who collected rates amounting to a sum considerably beyond the plaintiff's demand, but instead of paying him, the defendant applied them towards the repair of the roads. The under-sheriff submitted three.

Assumpsit for money had and received may be maintained by one surveyor of the highways against his co-surveyor, to whom he has delivered up the rate-book, under an agreement that the latter shall, out of the rates to be collected by him, pay the former the sums that he has advanced out of his own pocket for the repair of the roads.

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LIDDARD
v.
HOSKINS.

questions to the jury: First, Was there a sum of 15*l.* due to the plaintiff as surveyor, when he gave up the book? Secondly, Did the defendant promise, on consideration of receiving the book, that he would pay the plaintiff 15*l.* out of the rates when collected? and Thirdly, Had 15*l.* been collected by the defendant out of the rates? The jury found a verdict for the plaintiff, damages 15*l.*

Shee now moved for a new trial, and submitted that the present action would not lie against the defendant, for supposing there had been an agreement between him and the plaintiff for the transfer of the rate-book, it was *nudum pactum*. For where surveyors are appointed under the highway act, (13 *Geo.* 3. c. 78.) and there is only one book, which is held by one surveyor, still in point of law it is in the possession of both. [Lord Abinger C. B. Your proposition may be true as regards the public, but not as between the parties themselves. Parke B. The plaintiff, by keeping the book, might have paid himself the 15*l.* by collecting the amount from the rate-payers.] There was nothing to show that the rate collected by the defendant was made to pay the plaintiff; both parties were surveyors, and the rate would be for the repair of the roads. [Parke B. This was one of the purposes for which the rate was made.] The defendant was bound to take the book. [Parke B. Yes, but the plaintiff was not bound to give it to him.] An action will not lie by one surveyor against another to recover money out of the latter's pocket, as is the case here, for all the money received by the defendant was applied for proper purposes. [Parke B. But he had as much right to apply it to that as to any other purpose.] The defendant was bound to apply the money to the repair of the road.

[*Parke B.* A payment to the plaintiff would have been an application of it to the repair of the road, for he had advanced it for that object.] The plaintiff's accounts should have been passed before magistrates at special sessions, according to the provisions of the 13 *Geo. 8. c. 78.* before he was entitled to sue at law for the sum due to him.

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LIDDARD

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HOLMES.

Lord ABINGER C. B.—There is nothing unreasonable or unlawful in such an agreement as was made in this case.

The other Barons concurred.

Rule refused.

BOOND *against* WOODALL.

SHEE had obtained a rule on behalf of the sheriff under the interpleader act, but the officer had refused to draw it up, on the ground that the affidavit did not deny collusion. The sheriff need not deny collusion in order to obtain relief under the interpleader act.

Shee therefore applied to the Court, and cited *Dobbin v. Green*(a), as an authority that such a denial by the sheriff was not necessary.

The COURT (b), after referring to the statute, decided that it did not require the sheriff to deny collusion.

(a) 2 Dowl. P. C. 509.

(b) Lord Abinger C. B., *Parke B.*, *Alderson B.*, and *Gurney B.*

1881

THURSDAY

Where the plaintiff, who was a minor and a party to a suit in equity, was desirous of changing the solicitor employed, and such solicitor having notice of his intention wrote a letter to the plaintiff's next friend, who was answerable for the costs of the suit; it was held that the letter was a privileged communication, although it alleged that the plaintiff, who had been apprenticed to a civil engineer, had had a present made him by his master of his indentures because he was worse than useless in his office.

WRIGHT against WOODGATE.

DECLARATION stated that the plaintiff was entitled, under the will of *William Wright*, to real and personal property, and had filed his bill in the Court of Chancery against certain parties, in order to establish the will, which cause, at the time, &c. was still pending. That his father died when the plaintiff was twelve years old, and he became a ward of the court, and receivers of his property had been appointed, and one *Henry Byrom* was his next friend to prosecute the said suit for him, and one *William Jackson* was his guardian. That the plaintiff before &c. had been apprenticed to one *George Hennett*, a surveyor and civil engineer. After some other allegations it averred that the defendant was a solicitor, and one of the firm of *Currie, Horne & Woodgate*, and had acted as the solicitor and legal adviser of the plaintiff in the said cause. It then stated that the plaintiff was dissatisfied, for various specified reasons, with the conduct of the defendant, and was desirous of retaining some other solicitor on his behalf, but in order thereunto it was necessary to obtain the permission of the said *Henry Byrom*. The declaration then set out the alleged libel, which was contained in the following letter to Mr. *Byrom*.

WRIGHT v. HAMERTON.

DEAR SIR,

At the time you were concerned for this infant, you were named in the pleadings as his next friend, and your name still continues thereon. Just before the last vacation the cause came on to be heard on further directions, when it was supposed the Court would decide what interest the infant took under the will, but the Master of the Rolls directed the hearing on this point to stand over until the infant would attain his majority, which will be some time in the course of next year. The infant has been with us this morning, endeavouring

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to persuade us to apply to the Master to open all the accounts of Mr. Hinks, the receiver, on the grounds that the maintenance money stated to have been paid him has not in point of fact been paid him. This we have refused to do, as the accounts have been long since passed, and payments duly and properly vouched. Mr. Wright has taken himself off in a great dudgeon, with a view to instruct some other solicitor to act for him, and has since sent word that he finds he must obtain some direction from you, since you have been named his next friend. Without looking more into the case than we have time at the present moment to do, we know not if any direction will be necessary from you, but we are inclined to think not, since he has a guardian, a Mr. Jackson (lately become his father-at-law), regularly appointed by the Court. There is something due to us for costs. Should any application be made to you, probably you will oblige us by declining to interfere; at all events until our costs are paid. You are acquainted with the disposition of Mr. Wright, and therefore will not be surprised to hear he is seeking a quarrel with us. When we are paid he is at liberty with his guardian to take the business where he pleases. At present there is nothing doing in the suit but the passing of the receiver's accounts. Some little time since he was apprenticed to a most respectable surveyor and civil engineer, but we understand his master has made him a present of his indentures, because he was worse than useless in his office: he is under terms to make a settlement on his wife on his coming of age, and because we tell him we are bound to the Court to see a settlement made according to its order, he wishes us to be no longer employed, that he may, we think, avoid the order, and before the question as to this will can be determined, it must be ascertained whether or not his father made a will. This is an inquiry he cannot bear to have named to him, and the more particularly so since he is told an attested copy of a will is in the possession of his aunt or sister. He considers his father to have died intestate, and treats himself as heir at law. For all that we have done for him since we were employed we have taken the directions of his guardian, and we think you cannot do better than refer him to the same quarter, should any application be made to you. With many apologies for troubling you with this long statement,

"We are, dear Sir,

"Yours faithfully,

"CURRIE, HORNE, & WOODGATE."

"H. Byrom, Esq.
Liverpool."

1885.


WRIGHT
v.
WOODGATE.

To this declaration the defendant pleaded, 1st. the general issue; 2dly, a justification of the clause in the letter relating to the plaintiff's apprenticeship; and 3dly, a justification of that part of the letter which stated that the plaintiff was under terms to make a settlement when he came of age. Replication to the second plea, *de injuriâ*. At the trial before Lord Abinger C. B. at the *Middlesex* sittings after last *Trinity* term, Mr. *Byrom* was called by the plaintiff to prove the receipt of the letter, the hand-writing of which was admitted. He stated he considered himself liable for the costs of the Chancery suit. On the closing of the plaintiff's case the defendant's counsel submitted to the lord chief baron that the plaintiff ought to be nonsuited, the letter being a privileged communication, as the defendant had a right to protect himself by securing the payment of his costs on the intended change of solicitors; and also on the ground that it was for Mr. *Byrom's* interest, he being liable for the costs of the suit, that he should be informed of the general character of the plaintiff. Lord Abinger thought, however, that the part of the letter relating to the apprenticeship was not a privileged communication, and refused to nonsuit the plaintiff; but his lordship afterwards stopped the defendant's counsel while addressing the jury, and said that on further consideration he was of opinion that clause also was privileged. He then told the defendant's counsel that they were bound to carry their case farther, by calling Mr. *Hennett* to prove malice, and if they did not, he would nonsuit the plaintiff. After some discussion, Mr. *Hennett* was called and cross-examined.

The jury having found a general verdict for the defendant,

Sir *F. Pollock* now applied to the Court for a rule why the verdict should not be set aside and a new trial had, or why the verdict on the second and third issues should not be entered for the plaintiff; but with respect to these issues, it was ultimately agreed that an application should be made to the lord chief baron at chambers. In support of his application for a new trial, he contended that the letter was sufficient in itself to go to the jury, and might have afforded a chance of obtaining a verdict, had not the lord chief baron told the plaintiff's counsel that he would nonsuit the plaintiff if he did not call a particular witness to prove malice. [*Parke B.* It is quite clear that you could not have a verdict unless you called a witness to prove that the fact was known by the defendant to be untrue. His lordship's expression must be understood in the ordinary sense you attach to the words when you tell a plaintiff you will nonsuit him. *Alderson B.* Strictly speaking no man can be nonsuited because a letter is a privileged communication, yet it is done every day.] The defendant's letter was most unprofessional and unjustifiable in its spirit and object. His intention was to prejudice the mind of Mr. *Byrom* against the plaintiff, and not merely to obtain his own costs. [*Parke B.* Where a man has a right to make a communication you must either show malice intrinsically from the language of the letter, or prove express malice.] A party has a right to make communications as to the characters of servants, and such being privileged, the question of *mala* or *bona fides* arises upon them, but this does not extend to voluntary communications, and no one has a right to volunteer a character in anticipation of a servant applying for another service. Here the letter itself shows that it was voluntary, and none of the statements contained in it have any foundation.

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v.
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1895.

WRIGHT
v.
WOODGATE.

PARKER B.—I entirely concur in the second opinion expressed by the lord chief baron at the trial, that the whole of this letter was a privileged communication. The occasion of writing it rebutted the inference of malice, and threw it upon the plaintiff to show that there was malice. That he might have made out either by directing the attention of the jury to the language of the letter, or by proving by extrinsic evidence that the defendant entertained malicious feelings. With respect to his lordship's expression that he would nonsuit the plaintiff, if he meant to say that it was incumbent upon the plaintiff to call the witness, otherwise the case should not go to the jury, or if his lordship had been asked to explain what he meant by the word nonsuit, and he had put that construction upon it, or if the plaintiff had insisted on having the document submitted to the jury and he had refused to allow it, then he would have been wrong; but his lordship's words cannot be considered as having been used in the strict sense which the plaintiff wishes to put upon them, but as only meaning that the plaintiff must fail if he did not prove express malice.

ALDERSON B.—It seems to me that what occurred during the trial comes to the same thing as if the lord chief baron had in the first instance told the plaintiff he must prove malice.

GURNEY B.—I think it was incumbent upon the plaintiff to show there was express malice in this communication..

Lord ABINGER C. B. (after referring to what passed at the trial.) The witness was called and cross-examined as to the material part of the letter relating to the indentures of apprenticeship, and, as I thought, he

proved the defendant's plea very fairly. (I told the jury that if they thought there was malice in the communication, they ought to find for the plaintiff--if not, for the defendant. I think substantial justice has been done, and that if there were a new trial, it would only lead to the same conclusion.)

to move for a new trial. **Rule refused.**

There is a great deal of evidence in this case, and it is not possible to do justice to it in a few words. The case is a very good one for the purpose of illustrating the law of libel.

DOX ON THE SEVERAL DENISES OF WHEELER and KINNER against FULLER.


EJECTMENT. At the trial before Lord Denman C. J., at the last *Berkshire* assizes, it appeared that the property in question was a piece of waste land outside of and adjoining to the Abbey of *Reading*. Some time previous to 1812, a person of the name of *Springhall* had erected a house upon wheels on the *locus in quo*, which had never been removed. *Springhall* gave up possession of the house to a Mrs. *Kinner*, who four years ago let it to the defendant at a yearly rent. An agreement was subsequently entered into between Mrs. *Kinner* and the defendant for the purchase of the premises, and some money was paid by the defendant, but the agreement was never perfected. Mrs. *Kinner* was the occupier of that part of the abbey which adjoined the *locus in quo* as under-tenant to Mr. *Vansittart*, by virtue of a lease granted in 1812. *Vansittart* afterwards conveyed to Mr. *Wheble*, and on the 19th of *March* 1831, *Wheble* gave Mrs. *Kinner* a notice to quit, but no notice to quit had been given by the latter to the defendant. In *October* 1832, *Wheble* gave Mrs. *Kinner* a receipt for rent due after

1835.
WRIGHT
v.
WOODGATE.

Previous to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held under a lease granted in 1812. The latter let the premises to the defendant. Held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord.

A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp under 55 G. 3. c. 184.

1835.


 Doe
 d.
 WHEBLE
 and Another
 v.
 FULLER.

the notice to quit, which contained a proviso that the acceptance of the rent should not be a waiver of the notice, and an objection was taken at the trial, but was overruled, that the proviso should have had an agreement stamp. The jury having found for the lessors of the plaintiff,

Ludlow Serjt. now moved for a new trial, on the ground that the verdict was against the evidence. No possession of the property in dispute was shown by Mr. *Wheble*, and the lease to Mrs. *Kinner*, in 1812, which he set up at the trial, was not sufficient to entitle him to recover, inasmuch as Mrs. *Kinner* did not become possessed of the property by virtue of such lease, but obtained it from *Springhall*, who had built a house upon it previous to the commencement of the demise to her of the adjoining land. The case established on the part of the defendant was, that the *locus in quo* was a piece of waste land, of which possession was taken more than twenty years ago.

LORD ABINGER C. B.—Suppose that you had a lease of the farm, which did not comprise the waste, and that a person came to the waste, and before he acquired any title, gave up the possession of it to you, could you claim it as your own?

PARKE B.—The defendant is estopped from denying the title of Mrs. *Kinner* to the property, and she in her turn is estopped from denying that of her landlord.

ALDERSON B. and GURNEY B. concurred.

Rule refused.



1835.

DOE on the several demises of RANDLE CHETHAM STRODE against SEATON and Others.

EJECTMENT for messuages in the city of *Bristol*. At the trial before *Gurney B.* at the last *Bristol* summer assizes, it appeared that the lessor of the plaintiff claimed under a Colonel *John Strode*, who by his will, dated the 31st *March* 1806, devised the property in question (after and subject to two previous limitations thereof in strict settlement to *Thomas Chetham Strode* and *Richard Chetham Strode*, who were the elder nephews of the testator,) to the lessor of the plaintiff. Colonel *Strode* died in *December* 1807, without issue, and the two first tenants for life under his will also died without issue, the former in *September* 1827, and the latter in *July* 1828. To prove the ownership of Colonel *Strode*, secondary evidence was given of a lease which had been granted by him, in *September* 1796, of the property to one *Samuel Thomas*, for the term of 21 years, at a yearly rent, which was reserved and made payable to the lessor, his heirs and assigns. The lease also contained a covenant by the lessee to deliver up the premises, on the expiration of the term, to Colonel *Strode*, his heirs and assigns. In *July* 1802, one *Hall*, to whom the lease had been assigned by the personal representatives of *Thomas*, assigned the residue of the term to one *John Weekes*, whose trustees and representatives the defendants were. On the part of the defendants evidence was adduced to show that the property in dispute had belonged to an uncle of Colonel *Strode*, of the name of *James Strode*, who died in 1749, and under whose will Colonel *Strode* was only entitled to an estate for life, and that upon his decease without issue, the property descended in fee to his nephew, the said *Thomas*

A lessee for years who. covenants to deliver up possession of the premises at the expiration of the term to the lessor, his heirs and assigns, is not estopped by such covenant from showing, after the death of the lessor, or the determination of the lease, that the lessor was only tenant for life of the property demised.

Where the parties are substantially the same, the judgment recovered by the defendant in a former action of ejectment, may be given in evidence against the lessor of the plaintiff at the trial of the second ejectment.

1835.

 DOE
 d.
 STRODE
 v.
 SEATON
 and Others.

Chetham Strode, who was the eldest son and heir at law of *Thomas Chetham* (who had purchased one moiety of the reversion,) and also of *Ann* his wife, who was one of the two daughters of Major *Edward Strode*, the father of Colonel *Strode*. The defendants further gave in evidence indentures of lease and release, dated in *September* 1813, whereby *Thomas Chetham Strode*, in consideration of 950*l.*, conveyed the premises to *Weekes* in fee. They likewise put in the judgment entered up upon the verdict obtained by them in a previous ejectment brought against them by the lessor of the plaintiff, together with the particulars of demand in that action, both of which the learned baron received in evidence. The jury having found for the defendants,

Bompas Serjt. now applied for a new trial, on the grounds, first, that the defendants were not entitled to dispute the title of the lessor of the plaintiff in the manner they had done at the trial; and, secondly, that the judgment recovered by the defendants in the former ejectment, should not have been admitted in evidence. Upon the first point he submitted that the defendants being the representatives of *Weekes*, who took an assignment of the lease granted by Colonel *Strode* to *Thomas*, in 1797, and on such assignment covenanted to perform all the covenants originally entered into by *Thomas*, could not dispute the title of the lessor of the plaintiff. Their defence at the trial was, that Colonel *Strode*, who died in 1806, was only tenant for life of the property, and that they were therefore not bound to deliver up the possession to his representatives at the expiration of the term, which took place in 1817. The rule of law is, that a tenant shall not dispute the lessor's title; and though it has been decided by *England v. Slade* (a), *Doe v. Ramsbottom* (b), and *Doe v.*

(a) 4 T. R. 682.

(b) 3 M. & S. 516.

Watson (a), that a tenant may show his landlord's title is determined, yet this case is clearly distinguishable; as here the assignee of the lease covenanted to deliver up possession to the lessor, his heirs or assigns, and he has no right, after so covenanting, notwithstanding his purchase of the property from *Thomas Chetham Strode*, to say that the lessor could not assign the premises, or that he had only an estate for life, and not an estate in fee. [*Parke* B. Is there any decision establishing that such a covenant creates a distinction? The sale to *Weekes* undoubtedly makes no difference in the case. The point is, could he, as assignee of the lease, have shown that Colonel *Strode* was only tenant for life, and is the heir of the latter now entitled to recover the property under the covenant in the lease, and can he maintain an action upon it? What title has the assignee of the tenant for life? If there be a remedy upon the covenant he cannot sue, but, if any body, the executor must.] The lessee is concluded by the lease from asserting that the lessor's title is at an end, for he cannot set up a title inconsistent with the express words of his covenant. [*Parke* B. Is it not clear that the lease operated by way of interest, and not by way of estoppel? A tenant for life may grant by way of demise for 21 years, and this lease was good for so many years as the tenant for life lived. A case similar to this is put in *Co. Lit.* 47 b, except that there the reversion in fee was purchased by the lessor, and not by the lessee.] The doctrine of estoppel is not properly applicable in this case, which falls within the rule that tenants shall not dispute their landlord's title, and which rule has sprung up from necessity. Secondly, the judgment in the former ejectment was not admissible in evidence against the lessor of the plaintiff in the present action, because the parties are not technically the same, and the eject-

1835.

Doe
v.


STRODE

v.

SEATON
and Others.

(a) 2 Stark. N. P. C. 230.

1835.


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ment is in respect of a different term. It is otherwise in an action for mesne profits, because there the action is between the same parties, and in respect of the same term. [Lord *Abinger* C. B. A judgment in ejectment may be given in evidence in another ejectment, but it is not conclusive. Suppose you had brought a real ejectment, might you not produce a lease to a former tenant in support of the landlord's title? Suppose you then went a step farther, and showed that a party had ejected such former tenant, and that the court had restored him to his possession, could you not give this in evidence? *Parke* B. The rule is, that if the parties are substantially the same, the former judgment in ejectment may be adduced in evidence.] New trials are frequently refused in cases of ejectment, because the parties may bring fresh actions, which they would never do if they were liable to be met by the judgment obtained against them at the former trial. [*Alderson* B. In the well known case of *Wright v. Doe dem. Tatham* (a), it was admitted that the former judgment would have been admissible if it had a judgment in ejectment, and not a judgment under an issue from the Court of Chancery.] There are no cases where judgment in ejectment has been given in evidence on the trial of another ejectment, and the text books lay it down that it is not admissible. [*Alderson* B. On the contrary, it is laid down in *Buller's Nisi Prius*, 232, b. that a verdict for the defendant in ejectment is receivable in evidence against the lessor of the plaintiff, and the same point is to be found in *Bacon's Abridgment, Evid. F.* vol. iii. p. 235. [ed. 1832.]

LORD ABINGER C. B.—A judgment in an ejectment is not conclusive when given in evidence, as a party

(a) 1 Ad. & E. S. and see *Doe dem. Foster v. Earl of Derby*, Id. 783.

may be entitled to possession at one time, but not at another, but it is clearly admissible. A man may have no other title than possession, and surely to show a judgment each time another seeks to eject him, is giving proof of a title by possession.

1835.
Dob
d.
STRODE
v.
SEATON
and Others.

PARKE B.—A judgment is in no case conclusive unless pleaded by way of estoppel (a), but if it be between the same parties, it is evidence to go to a jury. Here the former judgment shows, that on the day mentioned in the first demise, the lessor of the plaintiff had no title to demise the property in question.

ALDERSON and GURNEY Bs. concurred.


Rule refused.

(a) See *Voight v. Winch*, 2 B. & Ald. 662.

BEES against WILLIAMS and Another.

TRESPASS *quare clausum fregit*. Plea, that the Duke of Cleveland being seised in fee of the close in question, on the 26th March 1835 demised the same to the defendant *George Williams*, by virtue of which demise the defendants entered &c. Replication, that before such demise, to wit, on the 25th March 1830, the Duke of Cleveland demised the close to one *John Keel*, as tenant from year to year, who, on the 23d September 1834, demised it to the plaintiff, to hold the same from the 29th September then instant, as tenant at will thereof to him the said *John Keel*.
A. being a tenant of a close under B., and C. being tenant of another close under D., agreed without writing to exchange, and to pay each other's rent. Each took possession of the other's close pursuant to such arrangement, which was assented to by C., who was the steward of both the landlords: Held, that the transaction was a substitution of A. as tenant in the place of C., whose interest was surrendered by operation of law (20 C. 2. c. 3. s. 3.)

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 and Another.

Rejoinder, that after the demise to *Keel*, and before the demise made to the defendant *George Williams*, *Keel* surrendered all his interest in the close to the Duke of *Cleveland*. Surrejoinder, denying such surrender; on which issue was taken. At the trial before *Coleridge J.* at the last summer assizes for the county of *Somerset*, it appeared that the plaintiff had been a yearly tenant of a piece of glebe land belonging to the Rev. *John Vane*, the rector of *Burrington*, and that *John Keel* was a like yearly tenant of the close in question, under the Duke of *Cleveland*, a Mr. *Cockburn* being the steward of both the lessors. *Keel*, who was called for the plaintiff, stated, that some time in the beginning of 1834, he applied to Mr. *Cockburn* to be the tenant of the piece of glebe land, in case it became vacant, who said he should be glad to let him (*Keel*) have it as soon as it could conveniently be done. That he and the plaintiff met on the 23d *September* 1834, and made a verbal agreement to exchange their closes, he to pay the plaintiff's, and the plaintiff to pay his rent. That no money was paid on either side, the rent of the two fields being the same. That in pursuance of this agreement the plaintiff, on the 29th *September*, gave him possession of the piece of glebe land, and he gave the plaintiff possession of the close in question, and he told the plaintiff that he would inform Mr. *Cockburn* of what they had done, the first time he saw him, and that the plaintiff replied "very well." That he soon afterwards saw Mr. *Cockburn*, who, on being told of the exchange, said he was glad of it. That he (*Keel*) still held the glebe land, but had paid no rent for it, as none was due till the ensuing *Michaelmas*. The learned judge, in summing up, left it to the jury whether there had not been a surrender of *Keel's* interest in the close in question by operation of law, giving it as his opinion that such a surrender

had been made out. The jury having found for the defendant,

1855.
Bates
v.
WILKINS
and Another.

Erle now moved for a new trial, on the ground of misdirection. He submitted that there was no understanding on the part of the plaintiff that he was to become the tenant of the Duke of *Cleveland*, with whom he had contracted no relation of tenancy. The latter had no right as landlord against the plaintiff, the agreement being, not that the plaintiff should pay rent to the Duke of *Cleveland*, as tenant, but that he should pay *Keel's* rent, who was in like manner to pay his rent for the glebe land.

PARKE B.—The arrangement was mentioned to the agent of both of the landlords, who assented to the substitution, and there was therefore a surrender of *Keel's* interest by operation of law. The effect of the transaction was to create a fresh demise from the Duke of *Cleveland* to the plaintiff.

Erle.—There was no evidence to show that:

PARKE B.—Yes, there was.

ALDERSON B.—There was clearly evidence to go to the jury.

BOLLAND and GURNEY Bs. concurred.

Rule refused.

1835.

OWEN *against* PUGH.

Where in an action tried under a writ of trial upon a promissory note for two guineas, in which the requisites of the statute 17 Geo. 3. c. 30. had not been complied with, the under-sheriff directed the jury to find for the defendant, and the jury brought in their verdict "We find that the money is due, but that there is an informality in the note:"—Held, that if the verdict were not so clear that it could be entered for the defendant, that it amounted to a perverse verdict; and a new trial was granted, although the sum was under 5*l*.

ASSUMPSIT upon a promissory note for two guineas, made by the defendant and indorsed to the plaintiff. The usual money counts, a count for interest, and upon an account stated. Plea: the general issue. At the trial before the under-sheriff for the county of *Montgomery*, a promissory note for two guineas, made by the defendant to one *John Davies*, and by him indorsed to the plaintiff, was offered in evidence, but was objected to on the part of the defendant, as the requisites of the 17 Geo. 3. c. 30., had not been complied with. For the plaintiff it was contended that the above statute did not extend to *Wales*, it not being comprehended within the words "that part of *Great Britain* called *England*." The under-sheriff was of opinion that the objection taken to the note was fatal, and was about to nonsuit the plaintiff, when his attorney insisted on the case going to the jury; whereupon the under-sheriff directed them to find a verdict for the defendant. After some consideration the foreman said, "We find that the money is due." The under-sheriff told them to reconsider their verdict, which they at length brought in as follows: "We find that the money is due, but that there is an informality in the note." *J. Jerris* having obtained a rule why the verdict found for the plaintiff should not be set aside and a verdict entered for the defendant, or why there should not be a new trial,

C. Robinson now showed cause. The jury clearly found for the plaintiff, for the latter part of their verdict, relating to the informality of the note, is surplu-

sage, and according to the rule laid down by all the courts, no new trial can be had, as the amount recovered is under 5*l*. [*Parke* B. It is a question whether, under this finding of the jury, the verdict should not be entered for the defendant.] The declaration, besides the count on the note, contained the usual money counts, and the jury having found that the money was due, it is to be presumed that evidence was given of a debt to support some of those counts. [*Gurney* B. The only evidence offered was the note, and it could not be evidence under any circumstances for the plaintiff upon the money counts, as there was no privity between the parties.]

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OWEN
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J. Jervis contra was stopped by the Court.

PARKE B.—If the verdict is not so clear that we can enter it for the defendant, the finding of the jury amounts to a perverse verdict, and therefore, notwithstanding the sum is under 5*l*., there must be a new trial.

The other Barons concurred.

Rule absolute for a new trial, upon which, if the defendant succeeded, he was to have the costs of both trials, unless the plaintiff consented to a judgment as in case of a nonsuit, in which case neither party was to have the costs of the day at the last trial.

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1835.

DAVIES *against* LLOYD.

Semble, that when an application has been made to a judge at chambers for a writ of trial under the 3 & 4 Will. 4. c. 42. s. 17., who has refused to make the order, that the court will not entertain the application, although the party might under the act have in the first instance come before the court.

CHILTON applied to the court on the part of the plaintiff, for a rule why this action should not be tried before the sheriff of the county of *Carmarthen*, by virtue of a writ of trial under the 3 & 4 Will. 4. c. 42. s. 17. An application had previously been made to *Gurney B.* at chambers, which was resisted by the defendant, and the learned judge had refused to make the order. [*Parke B.* Why do you not apply again at chambers? *Alderson B.* There is great difficulty in allowing applications of this kind in court, for we should defeat the intention of the act if we were not to carry it into execution in the cheapest way. It is also convenient that parties should go before a judge, where they may make mutual admissions. If the court is to overrule the decisions of a judge at chambers upon this point, we shall have perpetual applications.] The statute allows the application to be made either to a judge or to the court, and the subject has a right to appeal to the latter from the decision of the judge. [*Alderson B.* You may make an original application either to the court or to a judge. The question is, whether, after being before a judge, you can come here?] If we had come here in the first instance, the court would have recommended us to go before a judge. [*Alderson B.* Yes, but we must have heard you. *Gurney B.* You may go before some other judge with different materials.]

PARKE B.—If we are to be applied to after a party has been before a judge, he should bring all the facts before us which were before the judge at chambers. The act was never meant to apply but to very plain cases. You had better go before a judge again.

Rule refused.

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PICKFORD *against* EWINGTON.

HUMFREY had obtained a rule to set aside an order made in this case by Lord *Denman* C. J. upon the same affidavits as had been used by the parties when before his lordship.

Parties applying to the court to set aside an order made by a judge at chambers, may use the same affidavits as were before such judge when he made the order.

Mansel now showed cause. Where any matter has been disposed of at chambers upon affidavits, they are spent and cannot be made use of in applying to the court to set aside the order then made.

PARKE B.—Why should not parties, on making applications to the court, refer to the same affidavits as were before the judge at chambers, without being put to the expense of fresh affidavits?

The other Barons concurred.

Rule absolute.

POTTER *against* NEWMAN.

CHANNELL had obtained a rule for setting aside an award made in pursuance of an order of reference that did not contain any power to enlarge the time, but which had been enlarged the day before it expired by a judge's order, under the 3 & 4 *Will.* 4. c. 42. s. 39. By this clause, after reciting that "it is expedient to render references to arbitrators more

Semble, that the court or a judge may, under the 3 & 4 *Will.* 4. c. 42. s. 39., enlarge the time for an arbitrator to make his award, whether his authority

has been revoked or not, and although the order of reference contains no power to enlarge the original term.

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effectual," it is enacted, " That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of nisi prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award."

One of the grounds upon which *Channell* obtained the rule was, that the time had not been duly enlarged, as a judge under the above section had only power to make an enlargement where there had been a revocation of the umpire's authority, the words " any such arbitrator" referring to such an arbitrator as last before mentioned, whose appointment had been revoked.

Humfrey now showed cause. A judge under this clause has power to enlarge the order of reference, whether there has been a revocation or not. It is contended that the words " any such arbitrator" mean an arbitrator whose appointment has been revoked, as they refer to the arbitrator last before mentioned. But looking at the whole section, and the manner in which it is constructed, these words clearly relate to

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the first part, which speaks of “any arbitrator.” The middle portion of the clause directing the arbitrator to proceed, notwithstanding the revocation, is nugatory, as it only enforces what was said before; and if you strike it out, you then come to the part saying, that the court may from time to time enlarge the term “for any such arbitrator,” meaning the arbitrator first of all named. [Lord *Abinger* C. B. If you strike out the intermediate part there can be no doubt as to the construction of the clause.] If the court should decide that the act does not apply unless the umpire’s authority has been revoked, a revocation will give an arbitrator a power he did not before possess; for if there be no revocation he cannot go on after the expiration of the original time, but if there be, he may proceed after procuring the order of a judge.

At the suggestion of the Court, it was agreed that the case should be again referred to a professional arbitrator.

PARKE B.—I beg it to be understood that I do not adhere to the opinion I threw out when this rule was granted, that the act only applies where there has been a revocation of the submission. It is a good rule to take words according to their grammatical construction, and if we do so here, the words “any such arbitrator” seem to refer to the words “any arbitrator” in the first part of the section.

ALDERSON B.—This is a very nice point, and we wish to be understood that we do not decide it against the argument we have just heard, by which I have been a good deal shaken. But even if the construction contended for be the right one, there is no doubt that a court or a judge would never extend the time

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under an order of reference, which did not contain a power to enlarge the original term, unless on good grounds.

Rule discharged (a).

(a) During the argument of *Burley v. Stephens and Wife*, in Hilary term 1836, *Parke* and *Alderson* Bs. referred to the above case, and expressed a strong opinion that the 3 & 4 W. 4. c. 42. s. 39., gives the court or a judge a general power to enlarge the time for an arbitrator to make his award. See also *Skee v. Coxon*, 10 B. & Cr. 483.

The KING *against* The SHERIFF OF SURREY, in a cause
 of SHOWELL *against* YOUNG.

Where a sheriff had taken a bail-bond with only one surety, and being ruled to return the writ on the 15th, did not return it until the 16th; the court set aside an attachment which had been issued against him for not returning the writ. There seems to be a distinction where a sheriff has been ruled to return the writ, and where to bring in the body. In the latter case he will be fixed if he has taken a bail-bond with only one surety, but not in the former. The court, on setting aside an attachment against the sheriff, will make him compensate the plaintiff for any injury that the latter may have sustained, by his default.

IN this case the sheriff had arrested the defendant under a *capias* on the 8th *September*, and had taken a bail-bond for putting in bail above, with only one surety. On the 9th he was ruled to return the writ of *capias*, which he did not do until the 16th, being a day too late, owing to the absence of the senior clerk of the under-sheriff at sessions. On the 17th, notice of the writ being returned was given to the attorney for the plaintiff. Special bail should have been put in on the 15th, but, all the judges being out of town, it was not perfected until the 22d. On the 2nd *November* the defendant obtained an injunction in the equity side of the Court of Exchequer, restraining the plaintiff from proceeding in the cause. An attachment having issued against the sheriff for not returning the writ of *capias*, *Platt* had obtained a rule for setting such attachment aside on payment of costs.

Erle now showed cause. It is admitted that this attachment is regular, and where the sheriff has been

guilty of neglect, he will not be relieved; *Fuller v. Prest* (a), *The King v. The Sheriff of Surrey* (b). [Alderson B. The court laid down a rule yesterday that they would allow the party compensation for the injury which he may have suffered from the error of the sheriff. What injury have you sustained from the writ not being returned on the 15th? Supposing the default had been in term time, and you had come on the 16th and moved for an attachment, would not the rule on showing cause have been discharged upon payment of costs? Parke B. The return is only a day too late, and the attachment should be set aside on payment of any injury sustained and costs.] The cases establish that where there has been an irregularity, the sheriff is fixed, and the plaintiff seeks to fix him. Here the sheriff did not take proper bail, as he took a bail-bond with only one surety. In *The King v. The Sheriffs of London* (c), in which *Beaufage's* case, 10 Rep. 101, was cited, the Court of Common Pleas refused to set aside an attachment against a sheriff, who had taken a bail-bond executed by only one surety; and in *The King v. The Sheriff of Middlesex* (d), where a similar bond was taken, although the attachment was set aside at the instance of the bail, it seems to have been considered that if the application had been on the part of the sheriff, that he would not have been relieved. [Parke B. The distinction between those cases and the present is, that there the attachment was for not bringing in the body, while here it is for not returning the writ; and the only injury you have sustained is, that you have been delayed a day or two in bringing in the body. The default which fixes the sheriff is, where he makes default in bringing in the body; in which case the plaintiff is not bound to take an assignment of the bail-bond with only

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 v.  
 The SHERIFF  
 OF SURREY  
 in a cause  
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(a) 7 T. R. 109.

(b) 7 T. R. 239.

(c) 2 Bing. 227.

(d) 2 Dowl. P. C. 140.

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one bail. The plaintiff ought to have ruled the sheriff to have brought in the body.] No distinction of that kind appears in the cases which show that where the sheriff has been guilty of any default he may be fixed.

PARKE B.—It would be a very hard thing to fix the sheriff for a slip of this kind, which has been productive of no inconvenience.

The other Barons concurred.

Rule absolute on payment of costs, with liberty to the plaintiff to except to the special bail which had been put in.

See *Rex v. Sheriff of Lincolnshire*, post.

### MARSH *against* MONCKTON.

A rule for a new trial will not be granted on affidavits alleging that a material witness has been prevented from attending the trial, without showing grounds for a belief that the successful party is implicated in such misconduct: and it will not suffice to state merely a belief that the witness has been kept away at his instance.

IN this case, which was an action against the sheriff of *Staffordshire*, tried at the summer assizes for that county, and in which the plaintiff had obtained a verdict;

*Talfourd* Serjt. moved for a new trial, on affidavits which alleged the absence of a material witness for the defendant, whom the attorney for the defendant endeavoured to subpoena; and stated circumstances from which it might be inferred that the witness had been kept out of the way by certain persons named, but did not state any facts tending to bring home any misconduct to the plaintiff or his attorney, except the belief of one of the deponents that the witness was kept away by the procurement of the plaintiff.

The *Court* refused to grant any rule. The proper

course for the defendant to pursue was to apply, in due time, for the postponement of the trial, and he was not entitled to take his chance of success upon the case as it stood without the witness, and afterwards to apply for a new trial on the ground of his failure to appear. If, indeed, the affidavits had shown any ground for believing that the absence of the witness was procured by the criminal contrivance of the successful party, the court would have felt bound to interfere; but no such grounds had been stated, and without them the court would not disturb a verdict which the plaintiff was entitled to retain.

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Rule refused (a).

(a) See *Harrison v. Harrison*, 9 Price, 89.

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GODSON, administrator of MILLINGTON, *against* FREEMAN.

THIS was an action of assumpsit by plaintiff, as administrator of *Millington*, deceased, for the use and occupation of a farm of the intestate in his lifetime. At the trial before *Denman* C. J. at the last assizes for *Gloucestershire*, the occupation by the defendant of the farm in which *Millington* had a life interest for several years, was proved, as also that the farm was of a greater annual value than that at which the administrator had estimated it in his demand. But on the part of the defendant, receipts for the rent of the farm in question, at a much lower sum, were proved, on which the plaintiff's counsel submitted to a nonsuit.

The court will not interfere to relieve an executor or administrator from costs, under 3 & 4 W. 4. c. 42. on his failure in an action brought by him, merely because he acted *bond fide* and had fair apparent grounds for prosecuting the suit, but only when some misconduct on the part of the defendant, or other very peculiar grounds of interference are shown.

*Talfourd* Serjt. now moved for a rule to show cause why the judgment of nonsuit should not be entered

peculiar grounds of interference are shown.

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up without costs, pursuant to the power reserved to the court by 3 & 4 W. 4. c. 42. s. 31. He grounded his application on affidavits, which alleged that the plaintiff, to whom, as a creditor, administration had been granted, had reason to believe the arrears of rent to be unpaid; that he had applied to the widow of the deceased (who was the sister of the defendant) for information, that she had induced him to believe the debt to be justly due, and that the receipts took him entirely by surprise at the trial. He cited *Wilkinson, executrix, v. Edwards (a)*, *Southgate and others, executors, v. Crowley (b)*, and *Lysons v. Barrow (c)*, to show that where the personal representative has proceeded *bonâ fide* to recover a debt apparently due, the court will exercise the discretion which the statute gives them.

*Per Curiam.*—That is not the rule on which we are disposed to act. The statute has now placed executors and administrators in the same situation as the other parties, who, if they bring an unfounded action, are liable to pay the costs of the party whom they sue: and although it has invested the court with the power of depriving the successful defendant of costs, it is a power to be exercised only in very peculiar cases, or we shall have these applications in every case where an executor brings an action and fails. If there is any misconduct on the part of the defendant, whereby the executor has been encouraged to sue, that may afford a reason for the court's interference, and there may be peculiar cases of an analogous character; but it is not enough that the executor has believed the debt to be due. In this case, if the plaintiff had applied to the defendant to ascertain if he had receipts, and

(a) 1 Bing. N. C. 301.

(b) 1 Bing. N. C. 518.

(c) 10 Bing. 563, remarked on in *Ashton v. Pointer*, 5 Tyr. R. 322.

the defendant had concealed them, which had vexatiously induced the plaintiff to prosecute a hopeless suit, the court might have thought it a case for their interposition; but here there is no such misconduct on the part of the defendant, and there is no reason why he should not be indemnified against the costs of a suit to which it has been proved that he was not liable.

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## Rule refused (a).

(a) See *Ashton v. Pointer*, 5 Tyr. R. 322: and *Engler*, administrator, v. *Twiden*, 2 Bing. N. C. 263.

WAINWRIGHT, Executor of ABERCROMBY deceased,  
against BLAND and Others.

SIR John Campbell, Attorney-General, moved for security for costs, on affidavits stating that the action was on a policy of insurance, signed by the defendants as directors of the *Imperial Life Insurance Company*, effected on 22d October 1830, in the name of *Helen Abercromby*, a young lady half-sister of the plaintiff's wife, in 3000*l.*, to be paid in case she *H. A.* should die within two years. Plea: non assumpsit. The cause was tried on 29th June 1835, before Lord Abinger and a special jury. The defence was, that the insurance was really effected for the benefit of the plaintiff himself, who was the party really interested. The jury being unable to agree on their verdict, a juror was withdrawn, and the rest discharged by consent of both parties. There were contradictory affidavits, whether or not, when the juror was withdrawn, the plaintiff knew of the plaintiff's absence. After trial, and a jury discharged from giving a verdict, it is too late to move for security for costs of another trial, where the defendant knew that the plaintiff left *England* after issue joined and before the first trial.

A motion for security for costs, on the ground of the plaintiff's absence from *England*, must be made before issue joined, and as soon as the defendant knows the plaintiff to have left the country, as well as before he takes any further step. If made after issue joined, the court must be satisfied that the defendant did not, before that

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drawn, there was any understanding that the cause should be heard again. Notice of trial was subsequently given for the first sittings in this term, but having been before tried by a special jury, it stood over (a). The affidavits proceeded to state that the action was brought in 1831, but hung up by injunction till 17th *February* 1835; that the plaintiff was resident in *England* up to the time of joining issue thereon, but some time before the trial went abroad, and “from that time has been and still is, as deponent is informed and verily believes, resident in *France*; and deponent saith, he verily believes that the said plaintiff hath permanently abandoned this country, and that there is no probability or intention on his part of his ever returning to the same; and, on the contrary, deponent verily believes that the said plaintiff is now residing, and will continue to reside abroad, to avoid criminal prosecution.” The affidavit here alleged certain charges against the plaintiff for two forgeries on the bank of *England*, on which that belief of the deponent was founded, and then stated “that the plaintiff had not nor was entitled to any property or assets as executor to Miss *Abercromby*, or in any other right within the jurisdiction of this court, or in this country or else wheresoever, which could be seized in execution, or by means of which the plaintiff could satisfy the costs of that action, if judgment should be given therein for the defendants; and that unless he was required to give security for costs, they would never be able to recover them in that event.” After the new notice of trial this may be considered as a fresh action, and the defendants only seek for security for costs of any second trial. The costs of the first interpose no difficulty, for each

(a) A rule nisi was afterwards obtained by *Erle*, calling on the defendants to show cause why the rule for a special jury should not be discharged, or the defendant's special jury panel quashed, or that a new jury be nominated.


party must pay their own, and the plaintiff, whether or not he succeeded on the second trial, would not be liable to the defendants for the costs of the first, for his remedy was gone by the discharge of the jury. In *Seeley v. Powers* (a), a judge had discharged the jury of his own authority, on the ground that they could not agree; and *Patteson J.*, after looking into the cases, held, that the party ultimately successful would not be entitled to the costs of that first attempt at a trial; adding, that there could not be any distinction in practice between the cases of withdrawing a juror and discharging a jury without giving a verdict.

**LORD ABINGER C. B.**—This motion is made long after the period when the defendants became acquainted with the fact that the plaintiff had gone abroad. In the meantime the plaintiff has been suffered to go on incurring expenses.

**PARKE B.**—The general rule is, that security for costs must be moved for as early as possible, and before issue joined (b); but if moved for after issue joined, the court must be satisfied that the defendant did not, before that step in the cause was taken, know the circumstances on which he grounds his application. That discretion of the court has been constantly exercised in refusing this motion, unless made within a reasonable time after the plaintiff's departure from this country and residence abroad is known to the defendants. That is the just course, and prevents useless expense. Where no such motion is made in proper time, the plaintiff goes on to incur expense, instead of withdrawing the record, as he might otherwise do. The case before us resembles that of a remanet, or of a cause going off *pro defectu juratorum*.

(a) 3 Dowl. P. C. 372, *Hil.* 1835. See also *Everett v. Youells*, 3 B. & Adol. 349.

(b) *Reg. Gen. Hil.* 2 *Will.* 4. s. 98.

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ALDERSON B.—*Du Belloix v. Waterpark* (a) is in point. It was relied on in *Duncan v. Stint* (b) as a case in which all the decisions on this subject were reviewed. The rule was then laid down, that “when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of *England*, for a defendant ought not to wait till expense has been necessarily incurred, which must frequently be the case even before issue joined, particularly in actions of trespass and replevin.” In this case the motion would have come too late had it been made before the first trial, if the plaintiff had been put to expense in preparing for it after his departure from *England* was known to the defendant.

GURNEY B. concurred.

Rule refused.

(a) See the report in 1 D. &amp; R. 348, n.; also 5 B. &amp; Ald. 703.

(b) 5 B. & Ald. 702. 1 D. & R. 348, S. C. nom. *Duncan v. Stent*.

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### RAMSDEN *against* MAUGHAM.

A capias issued into *Surrey* on an affidavit of debt, of which a copy was placed on the *Surrey* file.

The defendant not being arrested on that writ, a capias and an alias capias were afterwards is-

sued on the same affidavit into *Middlesex*, by the same officer, and within a year from its date; Held, that the alias capias was regular, being founded on an affidavit which had not become stale by being more than a year old, and the plaintiff having a right to abandon the first capias into *Surrey*, and issue another into *Middlesex*, as if there had been no previous writ at all; and the affidavit being sworn before the same officer who issued the process into both counties. Nor do Nos. 6 and 7 of *Reg. Gen. Mich.* 3 W. 4. make any difference in the case.

THE defendant was arrested on 9th *November* in *Middlesex* by an officer, who delivered him a copy of an alias capias against him, directed to the sheriff of *Middlesex*. On search of the *Surrey* and *Middlesex* files of præcipes of writs of capias for *Middlesex* in the Exchequer office, a præcipe of a writ of capias in this cause was found, purporting that a capias issued on 9th *April* into *Surrey*, and that the affidavit of debt



was filed in *Surrey* on the same day. On the 7th *May* another writ of *capias* against the defendant was issued into *Middlesex*, upon the same affidavit of debt. The alias *capias* on which the arrest took place issued into *Middlesex* on 5th *November*, on the same affidavit of debt filed in *Surrey* on the 9th *April* last. Office copies of that affidavit and of the *capias* issued into *Surrey*, were annexed to the affidavits. All three writs were issued by the same officer of the court. It was also sworn, that no office-copy of any affidavit to hold to bail in *Middlesex* was filed.

*Ball* had obtained a rule to show cause why the writ of *capias* issued herein, upon which the defendant had been arrested, should not be set aside, and the defendant discharged out of custody on entering a common appearance, and that the plaintiff should pay the costs of and occasioned by the application. *Reg. Gen. Mich. 3 Will. 4. No. 6.*, shows that the alias *capias* into *Middlesex* should have referred to the *capias* previously issued into *Surrey* as well as to that issued into *Middlesex*. A plaintiff may make an affidavit of debt and issue a *capias* into one county, and afterwards, on the same affidavit, issue a fresh *capias* into another county, without referring to the former writ, but must pay the costs of the second *capias*. Defendant, if arrested in the second county, should put in bail there.

*Barstow* showed cause. *Rodwell v. Chapman* (a),

(a) *Rodwell v. Chapman*. From *Tyrrhitt's MSS. Exch. Mich. 1832*. A *capias* was issued into *London* on an affidavit made there on 8th *November*. On the 13th a second *capias* issued into *Essex*, on which the defendant was arrested. On the 21st *Maule* moved to set aside the second *capias* for irregularity, and to deliver up the bail-bond to be cancelled, contending that an alias *capias* ought to have been issued into *Essex*, referring to the former writ in the form in *Reg. Gen. Mich. T. 3 W. 4. Nos. 6 & 7*; or where is the defendant to put in special bail? But, *per Curiam* (*Bayley, Vaughan, Bolland, and Gurney B.*) the affidavit of debt being made in *London*,

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which occurred just after the uniformity of process act, 2 Will. 4. c. 39. came into operation, is directly in point to show that distinct writs of capias may be issued into different counties on the same affidavit, notwithstanding the general rule cited, which was agreed to by the judges under s. 14 of the act. Besides, *Coppin v. Potter* (a) shows, that as the affidavit was sworn before the same officer who issued all the writs, the alias was regular.

*Ball* contra. In that case there were not two independent, and quasi original writs of capias, as here. In *Boyd v. Durand* (b), Sir James Mansfield says, "it may deserve consideration whether the practice is proper, of suing out a writ of capias alike into two counties, instead of pursuing the old common law practice of suing out a testatum capias." Again, the alias capias issued on 5th November, on an affidavit sworn on 9th April.

PARKE B.—The case of *Rodwell v. Chapman* de-

where the deponent happened to be at the time, a writ might be sued out on it into another county. Nothing was here done on the capias issued into London, and a fresh capias, not referring to the former writ as an alias, was issued into Essex. On this the defendant was arrested. Now had that arrest taken place on a writ issued on a stale affidavit, it might have been a different matter. The plaintiff must pay the costs of the new capias.\* No step has been taken on the first writ, but if the plaintiff ever proceeds on it, the defendant may apply to the court.† It will be quite safe to put in bail in Essex.‡

\* See *Drewer v. Harding*, 2 Dowl. P. C. 803, and 5 Tyr. R. 424.


† See *Price v. Day*, ante, Vol. V. p. 456.

‡ So, if the defendant is arrested on an alias or pluries issued into another county, pursuant to Reg. Gen. Mich. 3 W. 4. No. 7. Reg. Gen. Mich. 4 W. 4. 4 Tyr. R. 1.

(a) 10 Bingham. 441. See ante, p. 32.

(b) 2 Taunt. 165, 166.

cides that the first writ of capias may be abandoned, and another issued into a different county, as if there had been no previous writ at all, and without being a mere continuation of the first. To warrant the issuing of the second capias, it was essential that a valid affidavit to hold to bail should be subsisting at the time. Now I have always understood the practice to be that which the master now certifies to us that it is, viz. that an affidavit to hold to bail is not stale till it is more than a year old. The statute 12 Geo. 1. c. 29. s. 2. was here complied with, for the affidavit, of which the copy remains on the *Surrey* file, was sworn before the same officer who issued the first process into that county, and afterwards that which was directed to the sheriff of *Middlesex*. *Coppin v. Potter* (a) is in point. Nothing appears to have been done on the capias which issued into *Surrey*.

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BOLLAND, ALDERSON and GURNEY Bs. concurred.

Rule discharged with costs, being so moved.

(a) 10 Bingham. 441. See *Richards v. Stuart*, 10 Bingham. 322; and per *Lawrence J.* 2 Taunt. 166; and *Baker v. Allen*, 7 B. & Cr. 526.

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ROCK *against* JOHNSON.

A WRIT of capias had issued into *London*, on an affidavit to hold to bail, which was sworn on to bail, which was perfectly regular. The defendant not being taken in *London*, another capias issued into *Middlesex*, on a fresh affidavit, which was bad for having no date in the jurat, and no other affidavit having been filed, showing the day of the swearing: Held, that the second capias was regularly issued, the first made affidavit being sufficient to sustain it.

A prisoner may move to be discharged for irregularity in process after the time when other motions for irregularity must be made.

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25th *October*; no caption took place there; and on the 2nd *November* another *capias* was issued into *Middlesex*, on an affidavit to hold to bail, which was filed on 5th *November*, but had no date in the jurat. On the 4th, the defendant was arrested in *Middlesex* on the second writ; on the 17th, a summons was taken out to discharge the defendant out of custody; on the 20th, the learned baron refused to make an order; and on the 23rd, *J. J. Williams* moved to discharge the defendant out of the custody of the sheriff, on entering a common appearance. *Parke B.* asked whether any other affidavit had been filed showing the day on which the first was sworn (*a*)? The answer being in the negative, a rule was granted to show cause peremptorily at the rising of the court on the 25th, the last day of term.

*Petersdorff* showed cause. This was moved too late after the time for justifying special bail (12 days) had elapsed.

*Per Curiam*.—This is the case of a prisoner who has not given a bail-bond, and therefore cannot go to consult his attorney as he might otherwise have done.


*Petersdorff*. The first affidavit is set out on the affidavits, and strictly regular. That was sufficient to ground a second and concurrent writ of *capias*; for affidavits upon which defendants are to be held to bail in *London* and *Middlesex* are sworn, and office copies filed with the same officer (*b*).

*J. J. Williams* contra. The second affidavit was

(*a*) *Doe v. Roe*, 1 Chitty's Rep. 228.

(*b*) Sec 5 Tyr. R. 32, *Young v. Beck*, and *Ramsden v. Maugham*, ante, 40.

not irregular only, but void ; *Drewer v. Harding* (a). The second writ should have been an alias continuing the first.

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LORD ABINGER C. B.—A second writ of *capias* may be issued on the same affidavit without an alias. This case resembles *Ramsden v. Maugham*.

PARKE B.—The objection is grounded on this, that the defendant was misled by finding a defective affidavit on the file ; but on a little further search he would have found a good one.

ALDERSON B.—There was a perfectly regular affidavit on the *London* file, that would justify the issuing a *capias* on it into *Middlesex*.

GURNEY B. concurred.

Rule discharged with costs to be paid by defendant, being so moved against the plaintiff.

(a) 2 Dowl. P. C. 803, 253.

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JOHNSON, Administrator of STAMFORD, against  
 HAMILTON.

[INDEBITATUS *assumpsit*. The plaintiff recovered a verdict at the last *Liverpool* assizes. On the fourth day of the term *Wightman* moved in arrest of judgment ; he produced affidavits that in *February* last the plaintiff had sailed from *Liverpool* for the *Bight of Benin*, on board a vessel named the *Champion*, which

Where it was to be inferred from circumstances that a ship in which the plaintiff had embarked was lost at sea before the assizes at which a verdict was recovered in his name, though it did not appear positively that the plaintiff had perished ; the court granted a rule for continuing the *postea* in the hands of the associate, with stay of execution.

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had never been heard of since, and was supposed to have been lost in the *Irish* sea ; and wreck and spars belonging to her having been found there in *February* last, very shortly after she sailed, the insurers had paid for her as for a total loss. From these facts it is to be inferred that the plaintiff must have been dead before the last assizes.

*Per Curiam*.—This is not a mistrial. The defendant's remedy is to reverse the judgment as for error in fact (*a*), if it should turn out to be a fact that the plaintiff was dead before the assizes.

*Wightman*. The court may do the defendant justice without putting him to the expense of a writ of error, for it may direct the *postea* to be continued in the hands of the associate (*b*), with a stay of execution in the meantime.

The *Court* assented.

Rule accordingly.

(*a*) Tidd, 9th ed. 1136.

(*b*) See *Doe d. Davies v. Roe*, 1 B. & Cr. 118.


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### SOAMES *against* RAWLINGS.

The *Westminster* Court of Requests, as constituted by 14 *G.* 2. c. 20. and 24 *G.* 2. c. 42. has no jurisdiction in actions on the case for unliquidated damages ; but in actions for ascertained debts not exceeding the fixed amount, they may proceed as well by the rules of equity, as law.

**K**ELLY had obtained a rule to show cause why a writ of prohibition should not issue, directed to the Commissioners of the *Westminster* Court of Requests, to stay proceedings in this cause. The affidavits on which his motion was founded, pursuant to 1 *W.* 4. c. 21., (which took away the necessity for a

suggestion) stated, that the plaintiff had been served by the defendant with a notice of objection to the registry of his name in the list of electors for *Westminster*, for the parish in which he lived. The plaintiff did not appear before the revising barrister during the revision of the list of his parish, and the notice being proved, and the objection insisted on, his name was struck out. He afterwards attended during the revision of another list. He then issued a summons to the defendant to answer before the *Westminster* Court of Requests for his damages in loss of time in attending before the revising barrister. The majority of that court adjudicated that the defendant should pay the plaintiff's demand. Now the stats. 23 G. 2. c. 27. and 24 G. 2. c. 42. give jurisdiction in cases where a debt of ascertained amount, and not exceeding a certain sum, has been incurred, but do not extend to actions on the case for unliquidated damages, even where they are founded on contract. This appears from *Jonas v. Greening* (a), which was decided on similar words in 14 G. 2. c. 20. an act in *pari materia* for the city of *London*.

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Mr. *Fenn* and another commissioner, against whom the prohibition was prayed, showed cause in person. The court in question has power over petty disputes and trespasses; *e. g.* if a passenger breaks a pane of glass in a window, its value can be recovered, as an equitable "debt," using that term in the enlarged sense of a sum due from one man to another.

*Per Curiam*.—If an action of this kind is maintainable at all, it must be an action on the case, and an improper or corrupt motive on the part of the defendant must be established. This Court of Requests has no power to entertain the questions which would arise in

(a) 5 T. R. 529. See also *Postan v. Masser*, 4 Tyr. R. 999. S. P.

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such an action, its jurisdiction being confined to debts not exceeding a certain amount, though in exercising that jurisdiction it may proceed as well by the rules of equity as of law.

Rule absolute (a).

(a) As to prohibitions from the Court of Exchequer, see *Llen v. Seymore*, Palmer, 525; *Catesbie's case*, Lane, 39. Com. Dig. tit. Prohibition (B.), Bac. Ab. same title (M.): also 3 Bla. C. 112. And see *Jobbins's case*, Cro. Jac. 535.

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(REVENUE SIDE.)

The ATTORNEY-GENERAL *against* GREAVES.


Certain goods, the produce of *Asia*, being admissible to customs duty for use in the united kingdom, from *Asia* direct, in a *British* ship, were imported into this country from *Holland*, contrary to the navigation act now in force, 2 & 3 W. 4. c. 54. s. 3. An information was filed on sec. 44. of 3 & 4 W. 4. c. 53. (the smuggling prevention act) against the owner of

the goods for the treble value of them, charging him with being concerned in the unshipping of goods prohibited to be imported into the united kingdom, and alleging that the goods were "then and there liable to the duties of customs, the said duties of customs for the same not having been first paid or secured." Held, that the information was good, the allegation in question being framed in pursuance of the imperative terms of 3 & 4 W. 4. c. 53. s. 30.

THIS information was founded on 3 & 4 W. 4. c. 53. s. 44. and stated that *W. H. Greaves*, between the 1st day of *December*, 1831, and the day of filing the information, to wit, on 11th *August*, 1834, at *Ratcliff*, in the county of *Middlesex*, was assisting and otherwise concerned in unshipping from a certain vessel divers goods, to wit, 2196 lbs. weight of foreign nux vomica of the value of 284*l.* 6*s.* of lawful money, and 1626 lbs. weight of foreign coculus indicus of the value of 210*l.* 8*s.* 8*d.* amounting together to the sum of 494*l.* 14*s.* 8*d.* of lawful &c., the said nux vomica and coculus indicus being then and there liable to the duties of customs, the said duties of customs for the same not having being first paid or secured, contrary to the form of the statute in that case made and provided, whereby the said *W. H. Greaves* hath forfeited the sum of 1584*l.* 4*s.* of like lawful &c., the com-



missioners of customs who directed this prosecution to be commenced against the said *W. H. Greaves*, having elected that the forfeiture of the treble value of the said goods should be sued for instead of the penalty of 100*l.*; wherefore his said majesty's attorney-general, on behalf of his said majesty, prayeth the consideration of this court in the premises, and that his majesty may recover against the said *W. H. Greaves* the said forfeiture of 1484*l.* 4*s.*, and that due process of law may be awarded against the said *W. H. Greaves* to compel him to appear here in court to answer his said majesty concerning the said offence, and also concerning the said sum of money. Plea, general issue. At the trial before Lord *Abinger* C. B. and a special jury, at the Revenue sittings after last *Trinity* term, it appeared that the defendant was a general broker. A clerk from the ships' entry office at the custom-house produced the report of the entry of the *British* ship *Clancarty*, inwards, from *Rotterdam*. dated 8th *August* 1834, in which certain bales were reported as follows: " *I. L.* 1834, 34 bales. Contents unknown. Order" (*a*). Next day the defendant made the follow-

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(*a*) The practice of the port of *London* as to clearing goods inwards appeared from the evidence to be this:—After a ship's arrival, and being reported at the custom-house, the holder of the bill of lading, or his broker, when desirous to clear the goods, delivers to a clerk in the office of the receiver of duties, in the long room, a warrant and two duplicates made out from the bill of lading, and containing a statement of the bales, &c. constituting the cargo, described by their marks, &c. After passing the long room, and payment of duty there, that, viz. the original warrant, is sent to the register office, and is there certified and registered. An order signed by the registrar is then issued from that office, directed to the tide-waiter on board, for the delivery, on land, of certain goods described in the order, under care of the proper officers, and if the ship lies at a legal quay, is sent generally by the wharfinger's or dock company's clerk, who fetches it to save trouble to the holder of the bill of lading, or his broker, and is delivered by him to the tide-waiter. A copy of the original warrant is also made in an official book called the landing book,

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ing entry for 34 bales : “ *Brewer’s* quay. In the *Earl Clancarty*, *British* ship. *J. D. Williams* (captain’s name), *Rotterdam*. Prime entry. Home consumption. (Signed) *W. H. Greaves*.” Underneath followed : “ *I. L.* 1 to 34. Thirty-four bales containing 90 cwt. bayberries, duty 90 cwt. at 2s., 9<sup>l</sup>. (Dated) 9th *August* 1834.” This entry being checked and signed by the proper officers of the long room or collector’s office, was passed, and the duty being paid, the usual order or warrant was sent to the tide-waiter at *Brewer’s* quay, where the vessel lay, for landing and examining the bales and delivering them. A landing waiter, who attended the delivery of the cargo, stated that the 34 described bales were landed under his superintendence, and that in weighing them to ascertain the duty, a package burst, and some *nux vomica* fell out : on further search twenty of the bales were found to contain *nux vomica* and *coculus indicus*, and fourteen, bayberries only. The former articles were liable, by 3 & 4 *W. 4. c. 56.*, to a duty of 2s. 6<sup>d</sup>. per lb. and the latter to 2s. the cwt. The defendant being present admitted the bales to be his. The *nux vomica* and *coculus indicus* were condemned, no notice of claim being given under 3 & 4 *W. 4. c. 53. s. 76.* It was proved that the defendant afterwards petitioned the commissioners of customs respecting the seizure, and his share in the transaction. The weight of the *nux vomica* &c. was proved, and its single value admitted. The commissioners’ order for prosecution was proved. It was admitted at the trial that *nux vomica* and *coculus indicus* were the produce of *India*, or some other tropical climate. For the defendant it was objected, first, that the information was not supported by the evidence ; for though it stated the articles seized to be liable to payment of duties,

which is sent to the landing-waiter ; the tide-waiter then suffers the goods to be landed and weighed, under the superintendence of the landing-waiter, and if all is regular, the goods may be taken away by the owner :

thus treating them as legally importable on payment of duty, it was enacted by section 3 of 3 & 4 W. 4. c. 54. (the act in force for encouragement of *British* shipping navigation) that goods, the produce of *Asia*, *Africa*, or *America*, shall not be imported from *Europe* into the united kingdom, to be used therein, except from particular countries therein enumerated, which did not include *Holland*. The *Attorney-General v. Key (a)*, was cited to show that these goods should have been stated to be prohibited goods; secondly, the evidence does not prove an "unshipping" of goods without paying or securing the duty (they being prohibited) within the meaning of sec. 44 of 3 & 4 W. 4. c. 53., which was passed for prevention of smuggling, the goods never having left the quay, and being still in the possession of the customs. The jury found a verdict for the crown for 49*l.* 14*s.* 8*d.* subject to leave to move to enter a verdict for the defendant. A rule was afterwards granted on the first point, the court treating the second point as involved in the first.

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Sir *Robert Rolfe* Solicitor-General, *Tancred* and *Kaye* showed cause. It is contended that *nux vomica* and *coculus indicus* are improperly described in the information as liable to payment of duties of customs which had not been paid, being in fact goods prohibited to be imported at all from *Holland*. The present act for the regulation of customs is 3 & 4 W. 4. c. 52., and contains in sec. 58 "A table of prohibitions and restrictions inwards," which is divided into two lists, the first intituled, "A list of goods absolutely *prohibited* to be imported," and the other, "A list of goods subject to certain *restrictions* on importation." Now it is clear

(a) 1 Tyr. R. 52; S. C. in Error, 2 Tyr. R. 65.

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that the import of nux vomica and coculus indicus from all places soever is not prohibited, duties of customs being imposed on their importation by 3 & 4 W. 4. c. 56., though section 3 of the navigation act, 3 & 4 W. 4. c. 54., prohibits the produce of *Asia, Africa, and America*, from being imported from *Europe* into the united kingdom, to be used there, with certain exceptions not here applicable. [*Alderson B.* You would say that the prohibitions in 3 & 4 W. 4. c. 52. s. 58. applies to a particular mode of import, viz. from particular places, and does not extend to the goods themselves.] When the *Attorney-General v. Key* came before this court, the provision in force on this subject was 6 G. 4. c. 107. s. 128. ; that information was framed for importing tobacco and spirits in packages smaller than the legal dimensions, and harbouring them *without any duties thereon having been first paid or secured*. That allegation would have been supported by the facts, on the distinction that spirits and tobacco were only “goods subject to certain *restrictions* on importation,” had not section 128 of 6 G. 4. c. 107. been relied on by the court; their decision is rested upon the express terms of that section, which is precisely similar to section 132 of 3 & 4 W. 4. c. 52., as far as enacting that “all goods and all ships, vessels and boats, which by this act, or any act at any time in force, relating to the customs, shall be declared to be forfeited, shall and may be seized by any officer of the customs, and such forfeiture of any ship, vessel, or boat, shall be deemed to include the guns, tackle, apparel, and furniture of the same, and such forfeiture of any goods shall be *deemed* to include the proper package in which the same are contained.” The following proviso, which was subjoined to the section in 6 G. 4. has been omitted in section 132 of 3 & 4 W. 4. c. 52. now in force: “Provided always, that all goods, the importation of

which is restricted, either on account of the packages, or the place from whence the same shall be brought, or otherwise, shall be *deemed and taken* to be prohibited goods; and if any such goods shall be imported into the united kingdom, other than to be legally deposited or warehoused for exportation, the same shall be forfeited." Upon the law as it then stood under 6 G. 4. c. 108. it was argued for the crown, that, though spirits imported in smaller than legal packages by the defendant, and harboured by him, were goods to be deemed "prohibited" for the purposes of seizure and forfeiture, they might, notwithstanding, be alleged in pleading, as was stated in that information, to be goods "liable to duty," their legal importation being only restricted by requiring packages to exceed a certain dimension. But this court, and afterwards the court of error, decided, that as no reason was given for confining the common interpretation of the term "prohibited" to the narrow sense contended for, it ought to be read in its general and enlarged meaning, and that consequently the defendant was entitled to judgment on that information, as spirits imported in illegal packages could not be deemed goods which might be imported on paying the duties. To obviate the difficulties of pleading occasioned by that decision, the proviso which had formed part of 6 G. 4. c. 107. was omitted, as is before shown, and a new provision, 2 & 3 W. 4. c. 84. s. 30., was introduced, which having been repealed by 8 & 4 W. 4. c. 50. s. 1. was re-enacted in almost similar terms in 3 & 4 W. 4. c. 53. s. 30. as follows: "All goods, the importation of which is in any way *restricted*, which are of a description admissible to duties, and which shall be found and seized in the united kingdom, under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred

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in respect of them, be *described in any information* exhibited on account of such forfeiture or penalty, as *goods liable to and unshipped without payment of duties*. Thus the proviso in 6 G. 4. c. 107. s. 128. being omitted in the present act, the ground-work of *Attorney-General v. Key* fails, and the law is remitted to its former state, added to which is the above provision of 3 & 4 W. 4. c. 53. s. 30. This point was raised at nisi prius in *Attorney-General v. Tomsett (a)*, by the defendant's counsel, but not insisted on at the argument in banc. Lastly, if a particular act is legal under certain circumstances, the law will not presume that it takes place under circumstances rendering it illegal, till the latter are proved. Here there is no evidence that these goods were not, in fact, as they might have been in the first instance, legally, imported into the united kingdom from *Asia*, in a *British* or *Asiatic* ship, and having paid duty, might have been exported to *Holland*, from which the reimportation in question, under bill of store, would be legal by 3 & 4 W. 4. c. 52. s. 33. on paying the same duty as on the original; but that duty is not paid.

*J. Jervis* and *Welsby* for the defendant. The argument for the crown confounds the description of the goods themselves, with that of the offence for which the information is filed. Section 44 of 3 & 4 Will. 4. c. 53. contemplated the unshipment of only two distinct classes of goods, *vis.* prohibited and customable goods, but not the third class, which is described by the name of restricted goods. That class is not reached by sect. 44, but by section 30, which says it shall be described as goods liable to the payment of duties. *Coccus indicus* and *nux vomica*, however, are not restricted only, but prohibited; not sub modo, as some articles are, only

(a) Exch. Easter, 1835, see 5 Tyr. Rep. Part 3. Now in the press.

in respect of the place from which they are imported, but as some other articles enumerated, *viz.* clocks or watches marked with *British* assay marks, beef, &c., are, absolutely, prohibited by the customs regulation act, 3 & 4 *Will.* 4. c. 52. s. 58. Then the circumstances of *coculus indicus* and *nux vomica* being included in the table of duties in 3 & 4 *Will.* 4. c. 56. does not prove them to be prohibited *sub modo* only. Sect. 60 of 3 & 4 *Will.* 4. c. 52. shows that these goods cannot be imported from *Rotterdam* under any circumstances for use here; for it enacts, “that if by reason of the sort of any goods, or the place from whence, or the country or navigation of the ship in which any goods have been imported, they be such or be so imported as that they may not be used in the united kingdom, they shall not be entered, except to be warehoused, and it shall be declared upon the entry of such goods that they are entered to be warehoused for exportation only.” The customs then cannot remit the penalty and admit the goods for duty. [*Parke B.* You argue that that restriction would not apply to goods whose import was only restricted *sub modo*, for instance, as to the port from which they are brought, or the nature of the packages in which they are contained.] Before the *Attorney-General v. Key*, there were three classes of goods known to the customs, customable, restricted, and prohibited. The 6 *Geo.* 4. c. 107. s. 128. had by the proviso been intended to get rid of all difficulty in the distinction between customable and restricted goods, by including the whole under the two classes of customable and prohibited, restricted goods being “to be deemed” of the latter class. In consequence of that decision, 2 & 3 *Will.* 4. c. 84. s. 30., since re-enacted by 3 & 4 *Will.* 4. c. 53. s. 30., was passed with the same object, declaring that restricted goods, when imported from an illegal place “*shall*” be described in informations as

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liable to and unshipped without payment of duties. The former provision of 6 Geo. 4. c. 107. s. 128., that they should be deemed and taken to be prohibited goods (a), which has been omitted in 3 & 4 Will. 4. c. 52. s. 30., was infinitely stronger, because applying to the nature of the goods themselves. But 3 & 4 Will. 4. c. 53. s. 30. requires the goods to be restricted, and also to be admissible to duty. Now, the produce of Asia, &c. imported from Europe, contrary to the navigation act, which is most strictly enforced, are goods wholly prohibited, so that they cannot be admitted to duty, at the option of the commissioners. This point was not pressed in *Attorney-General v. Tomsett*, because it would have injured that defendant's argument, which rested on there being no importation at all, and no unshipment within the limits of the port of Dover. Besides, silks are in the list of goods liable to "restrictions" on importation. The only argument on which the case for the crown stood in the *Attorney-General v. Key*, was founded on the proviso which has since been omitted. [Lord Abinger C. B. The present is the case of goods, the importation of which from particular places is restricted, so that they come from thence in one sense as prohibited goods; but does that make them less "restricted" under the general section? Alderson B. How does the *Attorney-General v. Tomsett* differ from this case?] No enactment declared that silks should not be imported at all in vessels of less than 60 tons burden, but 3 & 4 Will. 4. c. 52. s. 58. after being thus headed, "A table of prohibitions and restrictions inwards," contains, first, "A list of goods absolutely prohibited to be imported;" and secondly, "A list of goods subject to certain restrictions on importation," containing this item, "manufactures of

(a) See also 3 & 4 Will. 4. c. 52. s. 119—121 & 125; and 3 & 4 Will. 4. c. 53. s. 29. 76. 77. 92. 100. 117 and 118.



silk, being the manufactures of *Europe*, unless into *London* &c. or into the port of *Dover* direct from *Calais*, and in a vessel of 60 tons or upwards, with licence of the commissioners of customs." [Alderson B. In the case cited there was no importation into *London*, or the point as to the unshipping in the port of *Dover* would not have been raised. Gurney B. Those silks were found under the ballast, and seized before they were unshipped.] To make 3 & 4 Will. 4. c. 53. s. 44. apply to goods prohibited, not merely in respect of the place from which they come, but of the package, it must be read to see that they are of a "description admissible to duty," in the language of section 30 of the same act. Description there means applied to general goods, as *coccus indicus* &c. [Alderson B. You must surely exclude the mode of importation, or there is no sense in the first part of the section. There are other goods which, but for the enactment of a restricted mode of import, would have been admissible on payment of duty.] Still the information confounds the description of the goods with that of the offence. It should have been rested on sect. 44. as for unshipping prohibited goods. Had these been goods not prohibited absolutely, but prohibited to be imported in vessels under the legal tonnage, or in packages under a particular size, or from certain countries, and the crown had proceeded for the penalties consequent on such importation by the navigation act 3 & 4 Will. 4. c. 54. s. 22. describing them as "goods liable to and unshipped without payment of duties," it would have been no defence to show that the custom duties had been paid for them. It has been argued, that though the navigation act, by enacting that certain goods shall not be imported from certain places, would render them prohibited without section 30 of 2 & 3 Will. 4. c. 53., the effect of that

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section is, that they shall be deemed to come from a legal port, and be treated accordingly. However, by 3 & 4 Will. 4. c. 52. s. 48. it is enacted, that “no goods shall be deemed to be imported from any particular place, unless they be imported direct from such place, and shall have been there laden on board the importing ship, either as the first shipment of such goods, or after the same shall have been actually landed at such place.” [*Alderson* B. You say that the offence must be an importing of prohibited goods, and that “restricted” goods are not “prohibited” within the purview of 3 & 4 Will. 4. c. 53. s. 30. for the purposes of describing this offence, though they may be for the constituting it. Then in *Attorney-General v. Tomsett* no offence at all was committed, for the goods there were prohibited sub modo only, by section 58 of that act, and were forfeited by being imported in an illegal manner. The only question there was, whether they were rightly described.] The term “prohibited” means not goods restricted or customable, but goods which cannot be imported at all or cannot be legally imported from a particular place, and therefore cannot be described as “liable to payment of duties.”

[*Alderson* B. The information describes the offence as the being concerned in the unshipping of goods liable to the payment of duties of customs, but which were unshipped without the duties having been so paid. As these are goods on which duties of customs could have been paid, they are not prohibited goods. Lord *Abinger* C. B. The real offence is, the importing goods from a place from which they cannot come in, on payment of duties. It is argued for the crown that sect. 30 of 3 & 4 Will. 4. c. 53. requires the goods to be described as “goods liable to and unshipped without payment of duties;” the question, however, is, how

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to describe the offence in pleading, so as to give the party that notice of it to which he is entitled; and whether, when imported from a prohibited country, it shall be sufficient to charge that they are imported without payment of duty.]

Now sect. 30 of 2 & 3 Will. 4. c. 84. may be explained by certain clauses, which show what is meant by "restricted." It says, that all goods, the importation of which is restricted (*i. e.* in any manner restricted) "either on account of the *package* or the *place* from which the same are brought, or otherwise, which are of a description admissible to duty, and which shall be found and seized in the united kingdom under any law relating to the customs or excise, shall for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, be described" in a particular way. Now 3 & 4 Will. 4. c. 53. s. 30. omits all the words respecting package or place, and says, "in any way." That must be read, "any place." [Alderson B. Then these goods are not restricted generally, but because they are brought from *Rotterdam*; then if that means "in any way" restricted, they must be described as in this information. Sect. 44 of 3 & 4 Will. 4. c. 53. contains two apparent descriptions, but three real ones. It contains under the word "prohibited," the offence of unshipping goods restricted from importation, and also that of unshipping without paying the customs duties on customable goods. One class consists of goods absolutely prohibited, another of customable goods, part of them consisting of goods restricted as to the place from which they come. Parke B. The words of section 30 of 3 & 4 Will. 4. c. 53., are not merely that they *may* be described as goods liable to and unshipped without payment of duties, but that they *shall* be so described. That section appears to comprehend the offence as

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well as the nature of the goods, and is imperative that they shall be so described; so that if the information had to describe the goods and the offence respecting them, according to the fact, it would have been demurrable.] A like point may arise on the game act 9 Ann. c. 25. s. 2., which declares that the having game in possession, by an unqualified person, shall be deemed an exposing thereof to sale.

Sir *Robert Rolfe* Solicitor-General, in reply. Had 3 & 4 Will. 4. c. 53. s. 30. enacted that the offence, and not the goods, should be described in specified terms, it would have been more clear; but that sufficiently appears to have been the meaning of the legislature. The object was to throw the onus on defendants of showing that articles thus restricted as to particular places from which they might be imported, came from the legal places; the penalty being the same whether it had been for landing without payment of duty, or from an illegal place. When goods liable to duty were landed without payment of it, the defendant was not to set up as a defence that they came from *Rotterdam*. [*Alderson* B. Had these articles been discovered to be imported from *Holland* after duty paid, the crown might have proceeded for the penalty of 100*l.* for the breach of the navigation act, 3 & 4 Will. 4. c. 54. s. 22., though not for the forfeiture consequent on non-payment of duty.]

Lord ABINGER C. B.—The court cannot but regret that in a case of this kind, likely to be of such great importance and frequent occurrence, somewhat more mature consideration should not have been bestowed on the terms of the particular enactments. However, after full consideration of this case, I entertain no doubt that the *Solicitor-General* is right, and that the legislature really meant that the offence

should be described in the terms pointed out in section 30 of 3 & 4 Will. 4. c. 53. Indeed if the words of that clause had been somewhat different, there would have been no ambiguity upon them; as, for example, if it had provided that the *offence* should be described in the manner here provided; for the ambiguity arises from saying that the *goods* shall be so described. Looking, however, at the whole clause together, it appears to me that the intention was, that they should be so described for the purposes of recovering the penalty. It appears to me, that the legislature evidently meant to avoid the inconvenience which had resulted from the former decision of the *Attorney-General v. Key*, which, however, I do not at all impugn. The act 6 Geo. 4. c. 107. on which that case turned, had stated the way in which goods under such circumstances should be described; by force of the terms of that act of parliament they were brought under the title of prohibited goods, therefore the crown could not aver against that act, that they were not prohibited. By the present statute 3 & 4 Will. 4. c. 53., that difficulty is removed, for sect. 30. says, that goods which were within a certain predicament, shall be described as goods liable to the payment of duty for the purpose of proceeding for the forfeiture of them, or for recovering the penalty; and I think the object of the legislature was to say, that the mode of information shall be in like manner, as if the goods had been imported without payment of duty; that is the short ground on which I think the objection fails, which has been very ingeniously argued by Mr. *Jervis*. I am not desirous to state my impression of the different clauses which have been cited, lest I should put a wrong construction on them, which I had rather not do. It appears to me that the information is substantially correct, and that the defendants could not meet the charge it contains, by saying that they had im-

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ported the goods from *Rotterdam*. I am of opinion, on that short ground, that the objection fails, and that the crown is entitled to sustain this verdict.

PARKE B.—I am also of opinion that the crown is entitled to sustain the verdict. This information is founded on sec. 44 of 3 & 4 W. 4. c. 53. which imposed a penalty on any person who should “assist, or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the united kingdom, or into the *Isle of Man*, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed,” any such goods. The question is on the construction of this clause, taken in conjunction with other clauses, on which the question mainly depends. This clause appears to have adopted almost precisely the same words as the corresponding clause in the statute 6 Geo. 4. c. 107. which was the subject of discussion in the case of the *Attorney-General v. Key*.

It appears that there are three descriptions of goods:—goods absolutely prohibited by law, in respect of which there could be no mistake; goods specially prohibited to be imported under particular circumstances, including goods prohibited to be imported by the general provisions of the navigation act, 3 & 4 W. 4. c. 54.; and goods permitted to be imported on the payment of certain duties under the customs’ duties act, c. 56. This clause in 6 Geo. 4. and the 30th sec. of the act 3 & 4 W. 4. c. 53. now in question, are intended to apply to all these cases. The question is, whether the goods in question, which may be imported *sub modo*, fall under the description of “prohibited goods,” or of “goods unshipped without payment of duty.” It is a question merely of form; for there is no doubt that an

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offence has been committed. When this point was before the court in the *Attorney-General v. Key*, the court were of opinion that the goods fell under the description of “prohibited goods;” mainly relying upon the express provision of the 6th Geo. 4. c. 107. s. 128., which section provides, “that all goods, the importation of which is restricted either on account of the packages or the place from whence the same shall be brought, or otherwise, shall be deemed and taken to be prohibited goods, and if any such goods shall be imported into the united kingdom, other than to be legally deposited or warehoused for exportation, the same shall be forfeited.” That clause puts a qualification on another clause, which enables the officer to seize all goods so imported. The argument in that case was, that that being a qualification of the clause was meant to extend to seizure only, leaving the penalty clause exactly as it was. That was an argument worthy of much attention; but the court disposed of it by saying, that they must put the same construction on the proviso as on the rest of the act; that it was intended to apply to all cases, and that all goods capable of being imported at all, were to be deemed “prohibited” goods; and it was on that ground the judgment of the court proceeded. Now that proviso has been left out, and on the present occasion an argument arises on that which was a very considerable question, whether, if there were no other clause, this might not be described as an aiding and assisting in the illegal unshipping of goods, without payment of duty? But it appears to me, that all difficulty is removed by the act of 3 & 4 W. 4. c. 53. s. 30., and the 2 & 3 W. 4. c. 84. s. 30. The latter section appears to have been introduced for the very purpose of obviating all difficulty; that provides, “That all goods, the importation of which is restricted, *either on account*

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*of the package or the place from which the same shall be brought,* (which precisely applies to the case in question) or otherwise, which are of a description admissible to duty, and which shall be found and seized in the united kingdom, under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, be described in any information exhibited on account of such forfeiture or penalty, as goods liable to and unshipped without payment of duties." If the question had arisen upon that clause, and not on the 3 & 4 W. 4. c. 53. s. 30., which has replaced it, there would, I apprehend, have been no doubt that it applied to the present case. For as the goods in question, which were restricted on account of the place from which they came, were liable to be seized, the only difficulty would arise on the words "admissible to duty." I understood the defendant's counsel to contend that that section was meant to apply only to those cases in which the goods were admissible on the payment of duty. Now it appears, on inquiry, that there is no case in which goods prohibited *sub modo* could be admitted on the payment of duty; if they are imported under circumstances in which they are liable to forfeiture, there is no clause enabling those specific goods to be admitted on payment of duty. Therefore we must see whether the words of this section are not to receive a different interpretation, the goods not being of a description admissible on duty; then we must put a different construction on these words, if they do not mean that those specific goods so imported are to be capable of being imported on payment of duty, but the goods that would be imported if they were not subject to those restrictions. Then if we look to the 2 & 3 W. 4. c. 84. s. 30. and there is no doubt we must put the same construction upon this



clause, for it is nothing more than a re-enactment of the same clause, which is, "that all goods, the importation of which is in any way restricted," (clearly including the case of goods from a port from which they could not legally come,) "which are of a description admissible to duty, and which shall be found and seized in the united kingdom under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, be described in any information exhibited on account of such forfeiture or penalty, as goods liable to, and unshipped without payment of, duties." Therefore it appears to me that the true construction of the clause is, that all goods, except those totally prohibited, are to be described as goods unshipped without payment of duties. On this ground, I am of opinion that the information is properly laid.

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ALDERSON B.—I am of the same opinion. This point must have come before the court of Exchequer since I have been in it, and previous to the *Attorney-General v. Tomsett*; for it was not at all new to me when the question arose in that case. Whether that be so or not, the ruling at nisi prius was fully admitted when the case came before the court. It was a case of great importance to the parties on account of the value, I think 14,000*l.*, but no objection was made on that ground, and the court pronounced against the defendant a judgment, which was quite wrong if this objection was valid, for undoubtedly it appeared upon the face of that information, as it does on this. I consider, therefore, the case of the *Attorney-General v. Tomsett* not merely as bearing upon the question, but as entitled to considerable weight; the decision at nisi prius being confirmed and acquiesced in by the court in

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banc, for that is the undoubted effect of the circumstances. The objection would assuredly have been taken, if the defendant's counsel had felt that there was any doubt that the court in banc would have come to the same conclusion. It appears to me that in order to describe the offence here charged, the being concerned in the unshipping of prohibited or uncustomed goods, the crown must look to sect. 30 of 3 & 4 W. 4. c. 53, which directs, that in the information for the forfeiture, the goods shall be described in a particular way. Now, how are those goods to be described in the information? It seems to me that when that section directs that goods placed in certain circumstances shall be described in a particular way, it in substance says, that that shall be the description of the offence, the description of the goods necessarily involving the description of the offence, which consists in unshipping those goods. In construing the clause, it appears to me also, that the previous clause, sect. 30 of the 2 & 3 W. 4. c. 84. must be taken into consideration; for I consider the words of the 3 & 4 W. 4. c. 53. as only describing in general words that which is to be found in the corresponding section. Trying it by that test, I therefore read the 30th sect. of the 3 & 4 W. 4. c. 53, as if they contained the words "on account of package, or on account of place from which brought or otherwise," which are in sect. 30 of 2 & 3 W. 4. c. 84. Then these being goods which are prohibited from being imported, by reason of the place from which they are brought, are to be described as goods uncustomed. A difficulty occurred to my brother *Parke* as to the description "admissible to duty." Now those words follow on the words "the importation of which is restricted;" therefore the goods admissible on duty must be goods admissible on duty, provided they are not imported under the restriction. If that is so, the

whole becomes plain and clear, and section 30 of 3 & 4 W. 4. c. 53. applies to those goods which are admissible on duty, if the importation has not been made in an improper manner, or from an improper place, and describes them as uncustomed goods. Possibly this clause may have been inserted for the reason the solicitor-general has assigned, that of preventing the crown from being at the necessity of proving the manner of the importation, whether they were in the proper manner admissible on duty. With respect to goods actually prohibited, there is no difficulty; for they are goods expressly named in the act of parliament, and, consequently, by naming them, the information would show that they were goods of a prohibited description. With respect to the difficulty which occurred to the mind of my lord chief baron respecting an information for a second offence, it strikes me that would not really occur, for the prohibited goods would be found nominatim in the act of parliament. It appears to me that the clause referred to in the *Attorney-General v. Key* would be utterly incomprehensible, if the present was not the right construction. I apprehend the reason of the difference of phraseology that occurred between the 2 & 3 W. 4. c. 84. and the 3 & 4 W. 4. c. 53. is this, that at the time that act passed, the clause under which the *Attorney-General v. Key* had been determined remained in force, and consequently the legislature thought fit to negative it in terms; after which they enacted the same clause by the 58th chapter of the 3 & 4 W. 4. without these words. Had they put in the whole of the general words in 3 & 4 W. 4. c. 53. I apprehend that would have removed all difficulty.

GURNEY B.—I am of the same opinion. If we were to allow this objection to prevail, we should defeat the

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purpose for which the 30th section of 3 & 4 W. 4. c. 53. was framed, and should violate both its spirit and its letter. Every ingredient in that section is to be found in this case. The goods imported are goods the importation of which is in a certain degree restricted; being the growth of *Asia* or *Africa*, they are not to be imported from any port in *Europe*; they are of a description admissible to duty, the meaning of which must be, that but for the restrictions they are admissible to importation on payment of duty. They have been found and seized in the united kingdom, under the laws relating to the regulation of the customs. Therefore, for the purpose of proceeding for their forfeiture, or for a penalty under section 44, the act directs, by section 30, that the goods shall be described in the information as goods liable to, and unshipped without the payment of, duty, and the information has so described them.

ALDERSON B. added, there is another reason why the act of parliament should be passed. When goods are prohibited, in the strictest sense, they are named. If those goods are prohibited sub modo, in order to bring them within the four corners of the information, it might be necessary to describe the manner of the importation, *e. g.* from *Amsterdam*, when it might turn out to have been from *Rotterdam*; and that might subject the crown to great difficulty.

Rule discharged.

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1835.

WRIGHT *against* SKINNER.

ISSUE having been joined on 22d *July*, the defendant, on summons to show cause before a learned baron, obtained an order to try before the sheriff in a fortnight, unless a *stet processus* was consented to. The plaintiff then took out a summons before the same judge to rescind that order. Another order was thereupon granted, calling on the plaintiff to try at the next court day. No notice of trial was given. The trial not having taken place,

*Mansel* obtained a rule for judgment as in case of a nonsuit.

*Humfrey* showed cause for the plaintiff. First, the learned baron's order was inoperative, for he had no power to make it without the consent of the plaintiff. Next, the cases of *Butterworth v. Crabtree* (a), and *Harle v. Wilson* (b), show that after a writ of trial has issued, pursuant to 3 & 4 W. 4. c. 42. s. 17., the plaintiff has the same time to try, as if no order for trial before the sheriff had been made, unless he gives the defendant notice of trial for a particular sheriff's court (c), for the order to try before the sheriff is a mere authority under the act 3 & 4 W. 4. c. 42. s. 17. Then this motion is premature in this or the next term, *Harle v. Wilson*. [*Parke* B. That decision shows that if notice of trial had been given, the case would have been very different.]

Issue having been joined on 22d *July*, the defendant took out a summons, calling on plaintiff to try before a sheriff in a fortnight, and a judge granted an order accordingly. The plaintiff took out a summons to rescind that order, and another order was obtained to try at the next court day. Held, first, that the judge had no power to make such an order; secondly, that a motion for judgment as in case of a nonsuit, in *Michaelmas* term, was premature; and, lastly, that that motion having been made on the faith of a judge's order, which was overturned by the decision of the court, the rule for judgment as in case of a nonsuit should be discharged without costs.

(a) 5 Tyr. Rep. 149.

(b) 3 Dowl. P. C. 658 ; and see *Williams v. Edwards*, id. 660.

(c) Ibid. And see *Baddeley v. Batty*, 3 Dowl. P. C. 205 ; *Lenney v. Poulter*, id. 650.

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*Mansel* for defendant. The plaintiff himself put this proceeding in motion, by taking out summonses to rescind the order to try before the sheriff in a fortnight.

PARKE B.—I much doubt whether a judge can impose terms upon a plaintiff, on an application of the defendant for leave to try before a sheriff. It is clear, from the cases cited, that this motion is premature; but as it was made on the faith of a judge's order, and our decision is, in effect, to set aside that order, the rule must be discharged without costs (*a*).

ALDERSON B.—I certainly had no authority to make any such order without consent. The plaintiff applied unnecessarily for the second order. He had the option to draw it up or not. If he had not done so, the defendant had no right to draw it up for him (*b*). That order amounted to nothing. A judge cannot impose terms on a plaintiff, on an application by the defendant, of this kind, except under very special circumstances.

The other barons concurring,

Rule discharged, without costs.

(*a*) The officer certified that, if not so specially directed, the costs would be costs in the cause.

(*b*) See *Charge v. Furhall*, 7 D. & R. 422; S. C. 4 B. & C. 865; also 4 Taunt. 233; 7 East, 542; 2 Cr. & J. 140.



1835.

CLARKE *against* ALLBUTT and Another.

CASE against the publishers of the *North Staffordshire Mercury*, for publishing an alleged libel, imputing to the plaintiff an intention to defraud certain persons. Another action against *Taylor and Garnett*, other newspaper proprietors, for publishing the same matter, had been tried in the court of Common Pleas at the sittings after last *Trinity* term. The verdict was for the defendants on the pleas of justification, but it being objected, for the plaintiff, that the pleas were not supported by the evidence, *Tindal* C. J. left it to the jury to assess the damages, and gave leave to move in this term to enter a verdict for the plaintiff for the amount. The damages were assessed at one farthing. A rule nisi having been granted on the 5th *November*, by the court of Common Pleas, to enter a verdict for the plaintiff, or for a new trial, Sir *William Follett*, on the 10th, obtained a rule in this court to show cause why the defendants should not have ten days' time to plead after the rule pending in the court of Common Pleas should be heard and disposed of, and for stay of proceedings in the meantime. The defendants' affidavits stated, that they could not with safety plead to this action till the rule granted in *Clarke v. Taylor and Garnett* in C. P. should be determined, the defence of the defendants in the present action being substantially the same as that of the said defendants in that action in the Common Pleas. The plaintiff's affidavit in answer stated, that believing that certain evidence, which he had been subsequently advised would have been conclusive to the jury in his favour, was not produced at the trial of the said cause, he commenced the present action.

An indefinite time to plead will not be granted on the ground that the defendant could not safely plead till a rule pending in another court, and involving the same matter of defence, is determined; but the court granted time to plead, fixing a certain day.

*Humfrey* showed cause for the plaintiff.

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*Per Curiam (a).*—With reference to the form in which this rule is moved, it is dangerous to make the time for proceeding in one court depend on the event of a suit pending in another; for it might so happen, from arrear of business in the latter, that the time for dispatching the business might be unseasonably protracted. But by fixing a day, on or before which the defendants must plead, that objection will be cured, and the judges of this court preserve their jurisdiction in it, so as to promote prompt proceedings by the parties litigant in the court of Common Pleas. With this qualification the rule may be absolute, on the ground that it is reasonable to allow the defendants time to plead, in order to see the event of *Clarke v. Taylor and Garnett*.

Rule absolute, the defendants to plead on or before a day fixed (b).

(a) *Parke, Bolland, Alderson, and Gurney Bs.*

(b) In Hilary term 1826 the defendants obtained further time to plead, the case in the C. P. not having been decided.

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LEWIS against NEWTON.

The uniformity of process act, 2 W. 4. c. 39. schedule No. 1. requires that the defendant's actual or supposed residence should be stated in the writ of summons. A writ of summons described the defendant's residence as "*Symonds-inn, Chancery-lane, in the city of London.*" A rule to set it aside for irregularity having been obtained, on an affidavit stating that the deponent had been informed that no part of *Symonds-inn* is situate in the city of *London*, but in the county of *Middlesex*, the court discharged the rule.

A RULE had been obtained by *Mansel*, to set aside the writ of summons, as well as the copy thereof and the service, for irregularity, in directing it to the defendant, describing his residence as of "*Symonds-inn, Chancery-lane, in the city of London.*" The plaintiff sued in person. The affidavit in support of the motion stated, that the deponent was informed (which information he believed to be true) that no part of *Symonds-inn* is situate in the city of *London*, but in



the county of *Middlesex*, and that he had been served with no other copy of any writ at the suit of the plaintiff.

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*Humfrey* showed cause without using his own affidavit. It has been held, that the residence of an attorney for the plaintiff required in the indorsement on a writ of summons, is sufficiently described there, as "*Gray's-inn, London*" (a). *Symonds-inn* may be taken as next to *Chancery-lane* in the city of *London*, as a man's residence in one county may be next to a post-town in another. Again, *Symonds-inn*, if entirely or in part in *London* or *Middlesex*, closely adjoins both. Then the court will not, on affidavit, enter into a question respecting the limits of adjoining counties (b), even where process is stated to have been served in a wrong county, or try whether the alleged residence be true or not, if on the face of it it appears sufficient.

*Mansel* contra. The act is imperative that the plaintiff's residence shall be stated. The affidavit of the defendant called for an answer by the plaintiff showing conclusively that the defendant's description in the writ was correct: but it receives none, and the affidavit sworn by the plaintiff is not used (c).

(a) *Egleheart v. Eyre*, 2 Dowl. P. C. 145.

(b) See *Chase v. Joyce*, 4 M. & S. 414; *Godfrey v. Littel*, Tamlyn's Rep. 221; *Watson v. Stedman*, 1 Marsh. 9; also the cases collected in Tidd, 9 ed. 168, 219.

(c) That affidavit stated, that though *Symonds-inn, Chancery-lane*, the place of residence of the said defendant, is in the county of *Middlesex*, and not actually in the city of *London*, the said inn is immediately bordering on the boundaries and suburbs of the city of *London*, and is within a few doors from the boundary mark of the said city, and is in fact surrounded by it, though not actually in it. It then stated, that defendant was served with the copy of the writ in *Serjeant's-inn, Chancery-lane*, which is actually in the city of *London*, and was not served with it in *Middlesex*.

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*Per Curiam.*—The act 2 W. 4. c. 39. certainly requires that the defendant's residence should be mentioned in writs. The form of No. 1 in the schedule particularizes the other requisites of the direction thus:—"William the Fourth to C. D. of &c. in the county of ———." That direction imports that the defendant's actual or supposed residence should be stated. But if there is no affidavit that *Symonds-inn* is not in *London*, we cannot set aside the writ. The defendant's affidavit merely states, that he is informed, without even adding "that he verily believes." That is not sufficient in support of such an application as the present (a).

Rule discharged.

(a) See *King v. Monkhouse*, 4 Tyr. R. 234; *Hooper v. Walker*, 5 Tyr. R. 130; *Lindredge v. Roe*, 1 Bingham N.C. 6; *Boster v. Levy*, id. 362; *Morris v. Smith*, 5 Tyr. R. Part 3.

### BUXTON *against* SPIRES.

In order to bring up a prisoner under the compulsory clauses of the lords' act, 32 G. 2. c. 28. the twenty days notice to which he is entitled under s. 16. must expire before the first day of the next term in which he is to be brought up. Therefore a notice served

ON the 13th *October* the defendant was served with notice that he would be brought up within the first seven days of the term, pursuant to the compulsory clause of the lords' act, 32 Geo. 2. c. 28. s. 16. Being brought up on the sixth day of the term accordingly,

*Humfrey* prayed that he might be remanded, on the ground that the twenty days' notice to him in writing, prescribed by that section, expired on the 2d *November*, being the first day of this term. The application is

on a prisoner on 13th *October*, is too late to bring him up within the first seven days of *Michaelmas* term, for, after excluding the day of service (13th *October*), it did not expire till and on the first day of the term, viz. 2d *November*.

*Semble*, the mode of calculating the number of days in any notice provided by a statute, is the same as that prescribed for the same purpose by *Reg. Gen. Hil. 2 W. 4. No. VIII.* in matters affected by the rules or practice of the courts.

therefore premature, for *Hayward v. Priest*(a) shows it to be necessary that the notice should expire *before* the first day of “the term next ensuing the expiration of the said twenty days.”

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*G. T. White* for the plaintiff. The mode of reckoning a given number of days, by excluding the first day and including the last, as prescribed by *Reg. Gen. Hil. 2 W. 4. No. VIII.*, only applies to the rules or practice of the courts, and not to a time fixed by act of parliament. If the 13th *October* is reckoned inclusively, the twenty days expired on the 1st *November*.

LORD ABINGER C. B.—The question is, what is the last antecedent to these words in sec. 16 of the lords' act, “which shall next ensue the expiration of the said twenty days.” It is clear that “the term” is the grammatical antecedent, and nothing in this case prevents the grammatical from being the legal construction. Then, in this case, the term *next* ensuing the *expiration* of the twenty days is not this term, but *Hilary* term next; for I assent to the decision of the court of Common Pleas, which has been cited.

PARKE B.—The notice was served on the 13th *October*, so that taking that day as excluded, the twenty days did not expire *till* the first day of the term, the *second* of *November*. Then referring, as we are bound to do, the words “*which* shall next ensue the *expiration* of the twenty days,” to the last antecedent, viz. “the term,” it appears, on the authority of *Hayward v. Priest*, that the twenty days' notice was not served in time, so as to expire on the 1st *November*, the day before this term began.

GURNEY B. concurred.

The defendant was remanded.

(a) This point is reported in 3 Moore & Scott, 388.

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MEREDITH *against* STOCKER.

In order to be enabled to use the issue on supporting a rule for judgment as in case of a nonsuit, the affidavit must refer to it, and the rule be drawn up on reading it. See *Reg. Gen. Hil. 2 W. 4. No. 70.*

**I**SSUE was joined in this cause in *Easter* term 1835, and notice of trial given for the second sitting in that term, which notice was continued to the sitting after the term. Plaintiff did not proceed to trial pursuant to notice. *Barstow* had obtained a rule for judgment as in case of a nonsuit; against which *Lee* showed cause, refusing to give a peremptory undertaking.

*Barstow*, in support of the rule, proposed to refer to the issue. In this court, there never was any rule calling on the plaintiff to enter the issue in order to move for judgment as in case of a nonsuit, *Coatsworth v. Martin* (a). Since *Reg. Gen. Hil. 2 W. 4. No. 70.* it is not necessary to enter it in K. B. or C. P. Then the issue will be presumed to be in court as if it had been actually entered.

*Lee* contra. When the issue was entered according to the old practice, it was referred to by the defendant's affidavit. That is not done here. In *Preedy v. Macfarlane* (b) this court refused to suffer a præcipe for a writ and particulars of demand annexed to a record to be referred to on the argument of a rule obtained in the cause after trial, they not being verified by any affidavit.

**ALDERSON B.**—The issue should have been referred to by the affidavit, and the rule should have been drawn up on reading the issue.

**Per Curiam.**—Lord *Abinger*, *Parke*, *Bolland*, and *Alderson*, Bs.

Rule discharged.

(a) 2 Tyr. R. 169.

(b) 5 Tyr. R. 356.

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**KEMP against HYSLOP and Another, Bail of JONES.**

**A**T the trial of the original action of *Kemp v. Jones*, at the last *Surrey* assizes, *Tindal* C. J., in pursuance of 1 W. 4. c. 7. s. 2., ordered execution to issue against the defendant forthwith. Accordingly a *capias ad satisfaciendum* was immediately issued, which was made returnable, not on a given day, but "immediately after execution thereof," in the words of 3 & 4 W. 4. c. 67. s. 2. The writ having lain in the sheriff's office for some time without being executed, a learned judge in the last vacation made an order for returning it under 2 W. 4. c. 39. s. 15. The sheriff having made a return of non est inventus thereupon, the plaintiff in the same vacation commenced the present action against the defendant's bail. The proceedings in that action having been set aside by order of a learned judge at chambers, on the ground that they were prematurely commenced, the plaintiff, on the first day of this term, obtained a rule to rescind that order, so as to continue his action against the bail. On the second day of the term the bail rendered the defendant.

The plaintiff having obtained a verdict at the summer assizes, the judge ordered execution to issue forthwith, under 1 W. 4. c. 7. s. 2; and a *ca. sa.* issued accordingly in vacation, returnable not on a given day, but immediately after execution thereof, in the words of 3 & 4 W. 4. c. 67. s. 2. The defendant not being taken, an order was made by a judge in vacation to return the writ, under 2 W. 4. c. 39. s. 15. Non est inventus having been returned, the plaintiff in the same vacation commenced an action against the defendant's bail. The court set aside the proceedings against the bail, holding that they could not be fixed till the following term.

*Busby* showed cause. This question turns on the meaning of "execution" in 3 & 4 W. 4. c. 67. s. 2. Before that provision writs of execution could only have been tested in term time; but since its passing, "all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after execution thereof." But this provision does not embrace the case of an execution against the person for the purpose of fixing the bail, though there may be good reason for its application to executions of *fi. fa.*, by which they will not be so fixed.

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Thus, if only a part of the debt can be levied on a *fi. fa.* in one county, the plaintiff may, for the sake of expedition, issue another *fi. fa.* into another, to obtain the residue of his demand, or may issue an *elegit* (a); but as the object of a *ca. sa.* can only be the personal caption of the defendant, that writ, when not executed, and when returned *non est inventus*, is *functus officio*, and the bail cannot be fixed by action till the next term. It is a *casus omissus* in the statute.

*Bompas Serjt. contra.* All writs of execution may now be made returnable immediately after execution thereof. [*Gurney B.* After the time expressed in writs for their return is past, it is common for judges to order them to be returned; but that is after the return-day is passed. Lord *Abinger C. B.* The act 3 & 4 *W. 4.* intended to secure a speedy return of writs of execution, in order to prevent sheriffs from keeping the proceeds in hand during the whole of a vacation.] If the construction contended for should prevail, a sheriff never could return *non est inventus*; but the question here is, whether, in case he cannot execute a *ca. sa.*, he may not make that return, if a judge, who by 2 *W. 4. c. 39. s. 15.* has the same power in vacation as the court has in term, to order the return of that writ, shall order him to return it. [Lord *Abinger C. B.* Has a court power to order a writ of execution to be returned before it is expressed to be returnable?] Perhaps not, if it fixes a definite return-day. But though a sheriff would not be liable to a penalty for not returning a writ before its expiration, it would be singular if a court could not order its officer to return its process at any time. If it cannot, this writ of *ca. sa.* could not be obeyed or returnable at all, except by

(a) As to concurrent writs of *ca. sa.*, see *Lewis v. Roberts and Morris*, 4 Tyr. R. 907.

virtue of its actual execution, and no sheriff could be brought into contempt on it. [*Parke B.* By s. 15 of 2 W. 4, c. 39., express power is given to the court in term time, and to a single judge in vacation, to order the return of the writs therein named, among which is a *ca. sa.* Taking that provision in conjunction with section 2 of the subsequent act of 3 & 4 W. 4, c. 57., it may perhaps turn out that a judge is authorized to order it to be returned, though not executed.] A sheriff is brought into court by the order of a judge, directing him to return a writ, which he has not obeyed; that is, not merely to send it back, but to give an answer respecting the disposal of it. [*Lord Abinger C. B.* Before the new statutes, the courts ordered sheriffs to return writs of *ca. sa.* in a certain number of days; a subsequent order for their return in a shorter time would be inconsistent. *Parke B.* At common law an order to return a writ not returnable *immediate*, was inconsistent with the exigency of the writ.] That was so while writs of execution were only returnable in term time, for the judges were then ready to receive the returns; but section 11 of 2 W. 4, c. 39. had it distinctly in view to give power to courts to receive returns of writs out of term. [*Lord Abinger C. B.* That section only applies to *mesne process*, for the purpose of bringing the party into court. It only enables the courts to receive in vacation the returns of writs of summons, *capias*, or *detainer*, already returnable within four days of the end of the preceding term, and not to anticipate the return of a writ which is only returnable in term, by making it returnable in vacation.] In this case the *ca. sa.* is made returnable "immediately after execution thereof," conformably to the 3 & 4 W. 4, c. 67. s. 2. The old writ directed the sheriff to take the defendant, if found in his bailiwick, and him safely keep, so that he might have

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his body at *Westminster* on a given day, to satisfy the plaintiff of £——, which he had by judgment and consideration of this court recovered against him. Though the order is to take the body, the court must, on principle, have power to inquire what the sheriff has done in the meantime. [Lord *Abinger* C. B. Suppose that a sheriff was not pressed by a plaintiff to return a writ returnable *immediatè*, and that a judge ordered it to be returned, could he return *non est inventus*? *Parke* B. A sheriff is bound to execute final process with all reasonable dispatch, losing no opportunity to do so; whereas it is sufficient on mesne process if he has the defendant at the return of the writ.] The law must be the same as to the power of a court or a judge to call on a sheriff to return a writ, whether he is so called on in consequence of a contempt, or neglect, or from an impossibility to return it; and they must depend on their right to call on him so to do. [*Parke* B. The difficulty arises from the omission to subjoin to the act 3 & 4 W. 4. c. 67. a schedule giving a form of the writ, as was done in the uniformity of process act 2 W. 4. c. 39., directing it to be returned within a fixed time from the date, or, in the meantime, by order of the court in term time, or of a judge in vacation. Lord *Abinger* C. B. If the 15th section of 2 W. 4. c. 39. had confined itself to writs of summons, *capias*, and *detainer*, being the writs issued by authority of that act, it is clear that it would not have extended to the present case; but it expressly mentions the writs of *ca. sa.*, *fi. fa.*, and *elegit*, giving the same authority to a judge in vacation, and to the court in term time, to order those kinds of writs to be returned; but the courts wanted no statutory power to enable them in term time, and after writs were expressed to be returnable, to order a return of them. *Parke* B. It is argued that the legislature, in passing the 2 W. 4. c. 39. s. 15., did not intend to accelerate the return



of writs of execution, but to enable the parties to have them brought into court in vacation; and that it did not then contemplate the abridging the time for returning them. Section 15. provides means to effect the return, at any time in vacation, of writs already made returnable in term. For instance, if a writ was returnable on the first return-day in a term, and no rule to return it had been taken out in the term, the sheriff could not by the old law be compelled to return it till the beginning of the following term (a); but the court in term time, or a judge in vacation, are now enabled to order a writ, of which the return-day is already passed, to be returned at any time.] If the sheriff can be called on to answer whether the writ is executed or not, a power as now stated exists. It is submitted, that if the return is regular, and is a return, the bail are equally fixed whether it is made in term or vacation.

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*Cur. ado. vult.*

In *Hilary* term 1836, the judgment of the court was delivered by

LORD ABINGER C. B. as follows.—A rule nisi was obtained in the last term to set aside an order of my brother *Bosanquet*, by which the proceedings on a recognizance of bail were set aside as irregular, and cause was shown. The facts were these: judgment having been obtained, on a trial at nisi prius, in the vacation; against the principal, a writ of *capias ad satisfaciendum* was sued out on the 14th of *August*, returnable immediately after the execution thereof, pursuant to the power given by the 3 & 4 W. 4. c. 67; and, on the same day, was lodged at the sheriff's office, and entered in the public book. On the 12th *September*, the lord

(a) See sect. 11.

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chief justice of the Common Pleas made an order on the sheriff to return the writ in six days, which was served on him on the 14th, and he returned the writ on the same day, "non est inventus." Proceedings were thereupon had against the bail, who applied at chambers to set them aside; and my brother *Bosanquet*, after taking time to consider, made an order to that effect, being of opinion that the bail were not regularly fixed. The question is, whether this order was right, and we are of opinion that it was. If no judge's order had been made to return the writ of ca. sa., there can be no question but that the bail would not have been fixed: for the writ of itself would not have been *returnable*, and until then the bail are not liable; and indeed it never could have been returnable at all, until the principal had been taken; and then the bail would have been discharged by the act of taking the principal.

But it is said, that the judge's order to return the writ has the effect of making it returnable at the time stated in the order; and that time having elapsed, and the writ having been lodged in the office for more than four clear days before that time, the bail are fixed. To this it is answered, first, that the judge had no power to make such an order, and that it is a mere nullity; and, secondly, if he had, still the bail have not had the advantage allowed them by law, and are not fixed.

With respect to the judge's power to issue the order, it was contended that such power was given, either by the 2 W. 4. c. 39. s. 15., or, by implication, by the 3 & 4 W. 4. c. 67., which first makes a *capias ad satisfaciendum* returnable *immediatè*, and which by the title appears to be an act to *amend* the former act; or, lastly, that the order was authorized by the general jurisdiction of the court over its own process. But admitting that such an order was legal, on one of these

three grounds, (and we are disposed to think it was a legal order for the purpose of compelling the sheriff to certify by his return what he had done with the writ,) we do not think it can have the effect of altering the time when the writ is returnable; and if it had such effect, we are of opinion that the bail could not be fixed, until notice of that order was given to them, or at least, until the order was lodged at the sheriff's office, with the writ, and an entry made of it in the public book, and that for more than four days, at least, before the time at which the order made the writ returnable. For if the order has the effect of making the writ returnable at a different time from that at which it was originally returnable, the bail have a right either to be informed when the writ is so made returnable by actual notice, or to have the power of ascertaining it, on the usual search in the office; so as to be able to render their principal before the return-day of the writ, (at which time it is a matter of right in them to render their principal,) and to have four clear days to enable them to do so.

It may indeed be well doubted whether bail *can* be fixed at all, except by process of ca. sa. in the old form, and if they could be, it would be productive of much hardship to them. The rule is, that the writ must lie in the office four days exclusive, before the return-day, and the four last days; and the bail, being bound to search the office, could protect themselves by an actual search during term, and for four days before it, under the old process. But if the optional process given by the late act, with a judge's order for its return, is sufficient to fix the bail, they cannot be safe without a perpetual search, *de die in diem*, in the sheriff's office, in vacation as well as in term; and it is very questionable whether the power given by the act could have been intended so materially to prejudice the

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situation of bail. We cannot help thinking that there is great weight in this objection, and it will be well to avoid it in future, by issuing the ca. sa. in the old form returnable in term, in those cases where it is intended to proceed against the bail. In the present case, however, we are of opinion, that the bail ought to be relieved, because, even supposing it competent for a plaintiff to proceed to fix bail, by the new form of writ, and supposing the judge's order to have the effect of altering the time when the writ was returnable, the bail have never been informed, or had the proper means of informing themselves, of the time when the writ was so made returnable.

The rule must therefore be discharged; and it must be with costs.

Rule discharged accordingly.

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SMEDLEY *against* JOYCE.

The form of plea to debt on simple contract, provided by *Reg. Gen. Hil. 4 W. 4.* "that the defendant never was indebted in manner and form as in the declaration alleged," must be adhered to in terms, or the plaintiff will have judgment on demurrer.

TO a declaration in debt on simple contract, the defendant pleaded, that he never did owe, instead of that he "never was indebted in manner and form as in the declaration alleged." *Reg. Gen. Hil. 4 Will. 4. (a)* It was contended, that the form adopted was synonymous, but the court intimated that the terms of the form must be adhered to. They, however, gave leave to amend if an affidavit of merits should be produced, otherwise the judgment to be for the plaintiff.

*Mansel*, for the plaintiff. *Carrington*, for the defendant.

(a) Pleadings in particular actions. Rules of Pleading in Covenant, No. 3.

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CONNOP *against* HOLMES.

**ASSUMPSIT.** The first count was by indorsee against the drawer of a bill of exchange for 100*l.* dated 13th *April* 1835, and made payable two months after date, and accepted by *T. P. Barlow*. The second count was by indorsee against the drawer of another bill for 200*l.*, dated 14th *April* 1835, payable two months after date, and accepted by the said *T. P. Barlow*. Counts, for money paid, and an account stated. Plea to the first and second counts, that before and at the time of the making of the said several bills of exchange by the defendant in those counts and each of them respectively mentioned, to wit, on the said 13th *April* 1835, the said *T. P. Barlow* was in want of a loan of a sum of money, to wit, the sum of 300*l.*, and then applied to the said plaintiff to lend and advance him the same; but which the said plaintiff was unwilling to do unless the said *T. P. Barlow* would accept the same partly in money and partly in wine; that is to say, two-thirds money and one-third wine; and would pay for the same by the said plaintiff's having the security of a bill or bills drawn by the defendant, and accepted by the said *T. P. Barlow*; and the defendant saith that the said *T. P. Barlow* then consented and agreed to the said terms, and gave notice thereof to the

Assumpsit on two bills of exchange by indorsee against drawer. Plea, that the acceptor was in want of a loan of 300*l.*, and applied to plaintiff to advance it, which he did on an agreement of the acceptor to take it two-thirds in money, and one-third in wine, and to pay for the same by bills drawn by the defendant and accepted by the borrower. That the defendant had notice of these terms, and the bills were accordingly drawn and accepted. The plea proceeded to state that no consideration ever

passed to defendant for the drawing the bills; that the wine was never delivered, and that the contract for the sale and delivery thereof was a gross fraud on the acceptor and the defendant.

Replication, that at the time of drawing the bills there was a good and sufficient consideration in value for the drawing and indorsing the bills by the defendant; concluding to the country.

Special demurrer, that the replication neither traversed nor confessed and avoided the plea, and should have concluded with a verification. The Court held the plea bad for not answering the whole declaration, and the plaintiff had judgment.

*Quere*, if fraud can be laid thus generally.

*Semle*, the replication should have concluded with a verification.

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said defendant, and that thereupon the said two several bills of exchange in the first and second counts respectively mentioned, were accordingly drawn by him the defendant, and accepted by the said *T. P. Barlow*. And the defendant further saith, that he never received any consideration or value, nor did any consideration ever move or pass from the said parties, or either of them, to the defendant for the drawing by him of the said several bills of exchange, or either of them, except as aforesaid. And he further saith, that the said wine hath not, nor hath any part of it, hitherto been delivered, and that the said contract for the sale and delivery thereof was a gross fraud both upon the said *T. P. Barlow* and the defendant. Verification.

A second plea of non assumpsit was pleaded to the residue of the causes of action in the declaration mentioned.

Replication. And the plaintiff as to the plea of the defendant by him firstly above pleaded, that is to say, as to the said first and second counts of the said declaration, saith, that there was, at the respective times of drawing the said bills of exchange in those counts mentioned, a good and sufficient consideration and value for the drawing and indorsing by the defendant of the said several bills of exchange, and each of them; concluding to the country. Similiter to the second plea.

Demurrer to the replication to the first plea. Assigning for special causes, that the same is no answer to the said plea, and neither traverses nor confesses and avoids the same, for that nothing is put in issue by the said replication, and for that the same concludes to the country, although no traverse is therein contained; with the general demurrer.

Joinder in demurrer.

*Miller* appeared in support of the demurrer. [Parke B. Supposing the replication to be bad for concluding to the country, the plea is also bad for not answering the whole declaration. It is confined to the sale and delivery of the wine, and merely states that it never was delivered. Then we must assume that the money was paid (a). Nor does the plea enable us to understand in what way the agreement for sale and delivery of the wine was a fraud. Alderson B. What do the terms "gross fraud" mean in that place in the plea where they occur?] It is in general sufficient to allege fraud and covin in those terms, and unnecessary to state the particulars in a plea (b).

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PARKE B.—It is not clear that the authorities bear out that proposition to its full extent (c). In *Mason v. Ditchburn* (d) the plea was, that the bond sued on was obtained by fraud, covin, and misrepresentation; and the question was, whether or not that plea was sustained in evidence: nor is the defect cured by the

(a) As to partial failure of consideration of a bill, see *Moggridge v. Jones*, 14 East, 486; Bayley on Bills, 4 ed. 396.

(b) 1 Chitty on Pleading, 4 ed. 424, 502, citing *Tresham's case*, 9 Rep. 110, where *Tatboise's case*, Plowden's R. 54 b, was relied on as determining that a general averment of covin was good, "because covin is secret, whereof by intendment another man cannot have knowledge;" but see *Edwards v. Brown*, 1 Tyr. R. 196.

(c) See 1 Tyr. R. 196, 197, *Edwards v. Brown*.

(d) Argued by *Thesiger* in the Exchequer, Easter term 1835. Debt on bond. Plea, that the bond was obtained by fraud &c. Issue having been taken, the defendant offered evidence of a concerted plan to misrepresent the amount of business for the purchase of which the bond was given. Lord Abinger rejected the evidence, being of opinion that no fraud being charged in the concoction of the deed itself, it only afforded a defence in equity. Verdict for the plaintiff. A new trial was granted in this term. See *D'Aranda v. Houston*, 6 C. & P. 511, Alderson B.

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plaintiff's having answered over, for the plea only relates to one-third of the demand.

ALDERSON and GURNEY Bs. concurring,

Judgment for plaintiff (a).

(a) See *Edwards v. Brown*, 1 Tyr. R. 194; *Bramah v. Roberts*, 9 Bing. 469, S. P; *Prescott v. Levy*, 3 Dowl. P. C. 403.

HOWELL and Others, Assignees of WATERS and JONES  
Bankrupts, *against* BOWERS.

The proper mode of procuring the superior Court at Westminster to exercise the discretion vested in them by s. 14 of 11 G. 4. and 1 W. 4. c. 70., of adopting the practice of any court of great session, &c., abolished by the act, is by motion. The practice in such a Court before its abolition by that act, cannot be pleaded to an action of sci. fa., on a judgment recovered therein.

SCIRE FACIAS on a judgment recovered in the *Carmarthenshire* court of great session by the bankrupts against the defendant, before the passing of stat. 1 W. 4. c. 70., "for the more effectual administration of justice in *England and Wales*," to wit, on 24th *September* 1828, and before they became bankrupts, stating the recovery of the judgment, the bankruptcy, and the appointment of the plaintiffs to be assignees before execution thereupon made. It then proceeded thus: and now on behalf of the said *T. Howell &c.*, as assignees as aforesaid, in our said court of Exchequer, we are informed, that although judgment was so given as aforesaid, yet that execution thereon still remains to be made to them; wherefore the said *T. Howell &c.* have humbly besought us to provide them, as such assignees as aforesaid, a proper remedy in this behalf, and we being willing that those things which were rightly done in our said court of great session before the passing of the said act should have due execution, command you, that, by honest men of your bailiwick, you should make known



to the said *H. B.* the defendant, that he be before the barons &c., on &c., to show if he hath or can say any thing for himself why the said *T. H.* &c., as such assignees as aforesaid, should not have execution against him upon the said judgment for the damages aforesaid, according to the force and effect of the said recovery, &c., &c. The return of nulla bona and non est inventus in the bailiwick was next stated; the appearance of defendant by *L. W.* his attorney, and the prayer of *T. H.* &c., that execution might be adjudged to them as such assignees as aforesaid for the damages aforesaid, according to the force and effect of the said recovery &c.

Plea: that the said plaintiffs ought not to have execution against defendant on the judgment, because he says that the said judgment in the said court of great session was recovered therein on and by default of the appearance of him the said defendant in and to an action of debt, commonly called debt on a *concessit solvere*, and that by the rule and practice of the said court of great session, established and prevalent in the said court at and from the time of the commencement of the said action, until and at the time of recovering the said judgment therein, and from thence until the time of the passing of the said act of parliament, 'in case of judgment by default of the appearance of the defendant in an action of debt, commonly called on a *concessit solvere*, no valid execution could issue against the defendant upon such judgment, unless an affidavit had been previously made by the plaintiff in such action before a judge of the said court of great session, during the time of the great session, or before a person authorized by special commission for that purpose during the vacation, in verification of the amount of the debt justly due from the defendant to the plaintiff in such action:' and the said defendant

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further says, that no such affidavit has ever been made by the said plaintiffs, or either of them, pursuant to the said rule and practice of the said court of great session, in verification of the amount of the debt justly due and owing from the said defendant to the said plaintiffs in the said action in which the said judgment was so obtained by them against him as aforesaid. Verification and prayer of judgment, if the plaintiffs ought to have execution on the said judgment against the defendant.

Demurrer, showing for causes that the said defendant has in his plea pleaded mere matter of practice of the said court of great session, the same not being pleadable in bar, and for that the said court of Exchequer is not bound by, and will not take notice of the practice of an inferior jurisdiction: and for that, the said defendant has in his said plea attempted to raise an immaterial issue, inasmuch as for any thing that appears to the court here, the said plaintiffs may yet make such an affidavit as is stated in the said plea to be necessary, according to the practice mentioned in the said plea, early enough to comply with the said practice: and for that the matter of the said plea is prematurely advanced: and for that the effect of the act of parliament in the plea mentioned or referred to was to give the said court of Exchequer exclusive power and jurisdiction over the said suit, proceedings, and judgment, and exclusive discretion to regulate the issuing of execution therein, and the proceedings in such execution: and for that it is at most discretionary with the said court of Exchequer, and not compulsory, to require such affidavit as in the said plea is mentioned: and for that a non-compliance by the said plaintiffs with the alleged practice in the said court of great session, would at most furnish only ground for application to the said court of Exchequer when the said plaintiffs should hereafter proceed to execute the

said judgment without having previously made such affidavit as in the said plea is mentioned. Joinder in demurrer.

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Sir William Follett in support of the demurrer. This suit was "depending" (a) in the court of great session at the time of passing the 11 Geo. 4. and 1 Will. 4. c. 70.

The court here called on

E. V. Williams to support the plea. This is a writ of *xi. fa.* calling on the defendant to show cause why execution should not issue on a judgment. By the practice of the court of great session, after judgment by default in debt on a *concessit solvere*, no execution could issue without an affidavit of the amount justly due to the plaintiff from the defendant. That was in the nature of a writ of inquiry, and the consequence of deciding it to be unnecessary in this instance will be, that the execution may be sued out for the nominal sum laid in the declaration. [*Parke B.* That practical inconvenience might be prevented by moving the court to restrain the plaintiff from issuing execution for more than the sum really due.] Still as the merits of the case depend on the practice of the court below, which is the subject-matter of dispute, it was pleadable; *Dudlow v. Watchorn and another* (b).

LORD ABINGER C. B.—This court is empowered by the stat. 11 Geo. 4. and 1 Will. 4. c. 70. s. 14., to adopt either its own practice or that of the court of great session, according to its discretion. Under that authority, our course has been to adopt our own practice,

(a) See *Williams v. Williams*, 1 Tyr. R. 351.

(b) 16 East, 39; see this case discussed in *Young v. Betk*, 5 Tyr. R. 30.

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unless on special application to us to adopt that of the court abrogated by the act. Such an application should have been made in this case as soon as the plaintiff took any step in the cause. But, on demurrer, we are not at liberty to exercise any discretion. It is still open to the defendant to make any application which he may think necessary.

PARKE B.—The first objection to the plea is, that it alleges a pure matter of practice; and, secondly, that the practice so pleaded is that of a court abolished by statute. For though we have discretion to adopt and act on that practice, yet it is a matter only to be brought before us by motion. The defendant might have pleaded the matter of law, and moved on that of the practice.

ALDERSON B.—It has been thought that a writ of inquiry should always be executed after judgment by default in debt (*a*); but no practical injury need be apprehended in this case.

GURNEY B. concurred.

Judgment for the plaintiff.

(*a*) See Tidd, 9th ed. 573; 14 East, 442; and 5 B. & Ald. 885.

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REX *against* The Sheriff of LINCOLNSHIRE, in a cause  
of BURTON *against* GEE.

A rule to set aside an attachment against the sheriff for not bringing in the body was discharged, it appearing that the defendant had not rendered, and bail had not been put in so as to be ready to justify on disposing of the rule; and the court refused to set aside the attachment on the terms of paying costs and rendering the defendant in a country cause in four days.

THE defendant being arrested on 31st *August*, gave a bail-bond on that day to the sheriff and was discharged. On 9th *September* special bail were put in, but it appeared from an affidavit of one of them, a country bail, that on justification by affidavit he was

that the defendant had not rendered, and bail had not been put in so as to be ready to justify on disposing of the rule; and the court refused to set aside the attachment on the terms of paying costs and rendering the defendant in a country cause in four days.

rejected on the ground of a mere misdescription in the affidavits, stating the deponent to be a house "holder" instead of house "keeper," and to be "possessed of" instead of "worth" (a) property to the amount of double the amount sued for above his debts (b). The defendant not being rendered or special bail perfected in due time, the sheriff was ruled to bring in the body; not doing so, an attachment was issued against him on 2d *November*, returnable on the 7th. On the 26th *October* the sheriff received notice from the defendant that it was intended to apply to set aside the attachment, and, in the meantime, not to pay the debt and costs, or assign the bail-bond. On the 6th *November* a rule was granted on behalf of that one of the bail, who had been rejected on account of having been stated in the affidavits to be a householder, for setting aside the attachment issued against the sheriff, and staying proceedings in the meantime on payment of costs and putting in and perfecting special bail, or rendering the defendant. The defendant swore to merits.

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*Wightman* showed cause. The application is not made on behalf of the sheriff but of one of the bail, and is therefore substantially the same as on a bail-bond; but bail has not been put in, neither has the defendant been rendered.

*Terrell* contra. *Bell v. Taylor* (c) shows, that in order to set aside an attachment or proceedings on a bail-bond, an affidavit of merits is sufficient, without its appearing on whose behalf the motion is made.

(a) *Derling v. Hutchinson*, 2 Tyr. R. 491; *Rogers v. Jones*, 3 Tyr. R. 256.

(b) The other bail was rejected, having attempted to justify by affidavit, though resident in *London*.

(c) 1 Chitt. R. 572. See *Baxley v. Newbold*, 4 Dowl. P. C. 177.

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The Court were inclined to discharge the rule with costs if the defendant was not rendered within four days, it being a *Lincolnshire* cause; observing, that the difficulty of arranging the terms of render showed the convenience of the rule laid down in *Tidd*, 9th ed. 816. from *Williams v. Waterfield* (a), that when the sheriff has been fixed, the practice is to move for a rule to show cause why on putting in bail the proceedings against him should not be set aside, and to have the bail ready to justify when that rule should be disposed of; but they finally discharged the rule without costs, on account of that passage in *Tidd*.

(a) 1 B. & P. 234. See *Smith v. Parslow*, 1 Tyr. R. 423.

### The KING against SEDGWICK.

An estate was put up and sold by auction for 15,500*l.*, and a deposit was paid on that sum, but by the conditions of sale the estate was made subject to an apportioned mortgage debt of 10,200*l.*, which was to be paid off by the purchaser when it became due. The mortgagee did not concur in the sale, and the sum received by the vendor was 5300*l.*, being the balance of the 15,500*l.* after deducting the mortgage: Held that this was a sale only of the equity of redemption by the mortgagor for 5300*l.*, upon which sum alone the auction duty was chargeable.

THIS action was tried before Lord Abinger C. B. at the sittings after last *Trinity* term, when a verdict was taken by consent for the crown, subject to the following special case.

This was a writ of *scire facias* on a bond for 1000*l.* given to his majesty by the defendant, an auctioneer. The defendant cravedoyer of the writ of *scire facias*, of the return thereon, and also of the conditions of the bond, by which, after reciting that by an act of parliament passed in the nineteenth year of the reign of his late majesty King George the Third, every person using or exercising the trade or business of an auctioneer is obliged to take out a licence for that purpose, and to give security by bond to his majesty, with

pose, and to give security by bond to his majesty, with the sum received by the vendor was 5300*l.*, being the balance of the 15,500*l.* after deducting the mortgage: Held that this was a sale only of the equity of redemption by the mortgagor for 5300*l.*, upon which sum alone the auction duty was chargeable.

two or more sufficient sureties, that he will, within twenty-five days after each and every sale by auction, deliver at the chief office of Excise in *London*, to the person who shall be appointed by the Commissioners of Excise to receive the same, an exact and particular account in writing of the total amount of money bid at each sale, and of the several articles, lots, or parcels which shall have been there sold, and the price of each and every such article, lot, or parcel; and, at the same time, make payment of all such sum or sums of money as shall be due and payable to his majesty in pursuance of that act; and that the said defendant had been duly licensed as an auctioneer; and that also by an act of parliament passed in the forty-second year of the reign of his late majesty, King *George* the Third, every such auctioneer was required, at the time of receiving his licence, to give security by bond in the sum of 1000*l.* for delivering accounts of sales and making payment of duty. It was conditioned, that if the said defendant should so deliver such account and make such payment to his majesty, according to the true intent and meaning of the several acts of parliament in that case made and provided, then the obligation to be void, otherwise to remain in full force; and the defendant then pleaded performance of the condition, except as to the sum of 154*l.* 11*s.* 8*d.*, and a tender and refusal of that sum.

The first replication averred, that the defendant did sell an estate in freehold lands by auction, that 15,500*l.* were bid for the same, and that defendant did not deliver a true and particular account in writing of such sale and bidding, according to the meaning of the several acts of parliament in that case made and provided.

The second replication averred, that defendant sold an estate in freehold lands, and that the sum of 452*l.*

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11*s.* 8*d.* became due to his majesty for duties upon such sale, and that defendant did not pay that sum, but made default, contrary to the acts of parliament in that case made and provided, and to the condition of the said bond.

Defendant rejoined to the first replication, that he did deliver an account according to the meaning of the said acts of parliament; and to the second replication, that no more of the sum of 452*l.* 11*s.* 8*d.*, in that replication mentioned, than the sum of 154*l.* 11*s.* 8*d.* became due to his majesty for duty on the sale in that replication mentioned.

Facts of the case. On the 31st *May* 1833, the defendant put up to sale by auction, in the Auction Mart in *London*, an estate in freehold and copyhold lands in the parish of *Watford*, in the county of *Herts*, in three lots; the whole estate was charged with a mortgage of 22,200*l.*, and the mortgagee was not compellable to receive payment of the mortgage money till 1st *May* 1836. He refused to receive the mortgage money before that period, and did not concur in the sale, or in the apportionment of the mortgage money to particular parcels of the estate.

The mortgagor employed the defendant to sell the estate, subject to the mortgage, and the particulars of sale contained amongst other things as follows:—

“ The whole of these estates are subject to a mortgage of 22,200*l.*, the mortgagee holding the title deeds. This charge is to be apportioned by the vendor on the respective lots as mentioned under the same, and the apportionment to be made, and the respective purchasers indemnified in manner hereinafter provided. The interest is secured at 4½ per cent. payable quarterly. The mortgagee is not compellable to receive his money till the 1st day of *May* 1836. An abstract of the mortgage deed will be produced at the time of sale, for inspection of purchasers.”



And in another part of the particulars with regard to the apportionment of the mortgage debt charged on the estate, as before mentioned :

“ A deed of mutual charge and indemnity of the respective lots is to be prepared by the vendor, for effecting the apportionment, and indemnifying the respective purchasers from the other portions, of the charge as between themselves, or as between them and the vendor, who is to be substituted as to any lot, if any should not be sold at this sale.

“ The purchaser or purchasers and vendor to give mutual covenants of indemnity and charge, and powers of sale &c. on the respective lots, for the purpose above-mentioned; and in case of any difference between the parties, the deed to be settled by counsel, to be named by the vendor, on behalf of all the parties, and the purchasers are also to indemnify the vendor in the usual manner against their respective portions of the mortgage debt, such indemnity to be prepared by the vendor. The purchasers to bear all their own costs relating to the several indemnities before mentioned.”

The 3rd condition of sale was as follows :—

“ That every purchaser shall immediately pay down into the hands of the auctioneer a deposit of 10*l.* per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 11th day of *October* next, at the office of Mr. *Goldsmith*, solicitor to the vendor, at which time and place the purchases are to be completed, and from which time the respective purchasers are to be intitled to the rents and profits of such parts as are let, and to possession of such parts as are in hand, all outgoings to that time being cleared by the vendor.”

The 5th condition was, “ That in case any of the

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title-deeds shall relate to several lots at this sale, the largest of such purchasers shall be entitled to the custody of such deeds on the mortgage being paid off, subject to his now giving to the other purchasers, at their expense, the usual covenant for production thereof, &c."

The 6th condition was, "That upon payment of the remainder of the purchase-money at the time above-mentioned, the purchasers shall have conveyances and surrenders of their respective lots, subject to such apportionment of the mortgage debt as before mentioned, to be prepared by their own solicitors at their expense, and left at the office of the vendor's said solicitor, on or before the 27th day of *September* next, for execution; and if, from any cause whatever, any purchase shall not be completed at the time stipulated in these conditions, the purchaser shall pay interest, at the rate of 4½ per cent. per annum, on his purchase-money remaining unpaid, from the time appointed for payment thereof, to the completion of such purchase."

The particulars of lot 2 stated, "The apportioned mortgage debt on this lot is 10,200*l.*, with the interest thereon from the 11th day of *October* next ensuing."

The lot No. 2, consisting of freehold lands in the parish of *Watford*, in the county of *Herts*, was put up for sale and purchased (being the only lot sold, the others being bought in,) by *Bailey Smith*, for 15,500*l.* he being at that sum the highest bidder. After the sale the following acknowledgment and agreement was indorsed on the particulars of sale, and signed by the purchaser:—"I, the undersigned *Bailey Smith*, do hereby acknowledge to have purchased lot 2, comprised in this particular (called *Bushey Lodge Farm*,) at the sum of 15,500*l.*, and I agree to complete the purchase

agreeably to the within particulars and conditions of sale. As witness my hand this 31st day of *May* 1838.  
*Bailey Smith.*

“Witness, *J. Sedgwick.*”

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The purchaser also paid the deposit of 10 per cent. on the whole amount of the purchase-money, 15,500*l.*

When the defendant attended to pass the sale at the Excise-Office, he returned lots 1 and 3 as bought in by the owner, according to the fact, and lot 2 he returned as follows:—

Sold for . . . . . £15,500

Deduct mortgage debt, (see below,) 10,200

Balance £5,300

The words “see below” had an asterisk referring to the apportionment of the mortgage-money on the lot.

On this return the defendant offered to pay the sum of 154*l.* 11*s.* 8*d.*, being the auction duty on the sum of 5300*l.*, but the excise accountant refused to accept this return and payment, claiming 452*l.* 11*s.* 8*d.* as the auction duty on 15,500*l.*, the purchase-money for which the lot was sold. A conveyance has been made by the vendor to the purchaser, subject to the payment of the 10,200*l.* and interest, the apportioned mortgage-debt, according to the conditions of sale.

The question for the consideration of the court is, whether there was due to the crown, from the defendant, the sum of 452*l.* 11*s.* 8*d.*, being the auction duty on the sum of 15,500*l.*, or the sum of 154*l.* 11*s.* 8*d.* only, being the auction duty on 5300*l.*

If the court shall be of opinion that the sum of 452*l.* 11*s.* 8*d.* was due, then the verdict to be entered for the crown, but if the court shall be of opinion that the sum of 154*l.* 11*s.* 8*d.* only was due, then the verdict to

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be entered for the defendant, on payment of the last-mentioned sum being made to the crown.

*Kaye* for the crown. This case depends upon the construction to be put upon the 43 *Geo. 3. c. 69. Schedule A.*; for although by the 45 *Geo. 3. c. 30.* the duty was increased, the language of the two acts is precisely similar. The words of the former act are, "for every 20s. of the purchase-money, arising or payable by virtue of any sale at auction in *Great Britain*, of any interest in possession or reversion of any freehold, copyhold, or leasehold lands, tenements or hereditaments." Two questions arise under this act; first, what interest in freehold lands has been sold? and, secondly, what is the amount of the purchase-money? [Lord *Abinger* C. B. Has any thing more been sold than has been conveyed? for if not, nothing has been conveyed but the equity of redemption.] The question raised by the crown is, whether there was not something more than the equity of redemption in the mortgagor, and whether the word "interest" in the act does not include an equitable as well as a legal interest. [Lord *Abinger* C. B. Suppose it does, the question is, what was sold? *Parke* B. The case does not clearly state what sum the vendor was to receive. Lord *Abinger* C. B. The bidding was 15,500*l.*, but it seems to have been stipulated that the purchaser should only pay 5300*l.*] Two early cases, *Coare v. Creed* (a), and *Rex v. Abbott* (b), in which it appears to have been held, that a mortgagor only possessed an equity of redemption, were recently reviewed and overruled by this court in *The King v. Winstanley* (c), which was afterwards carried to the Exchequer Chamber (d),

(a) 2 *Esp.* 699.(b) 3 *Price*, 178.(c) 2 *Y. & J.* 124.(d) 1 *Cr. & J.* 434.

and subsequently affirmed in the House of Lords (a). That case established the principle, that the whole of the estate was in the mortgagor. There an estate was mortgaged; the mortgagor afterwards became a bankrupt, and his assignees sold the estate. By the bankrupt acts, the estates of bankrupts, when sold by the assignees, are exempt from the auction duty. It was argued on the part of the crown, that as the estate was mortgaged, the only part which was exempt from the auction duty was the equity of redemption, which alone remained in the bankrupt; but the House of Lords decided, that the whole of the estate was in him, and was consequently exempt from duty. [*Alderson* B. The question in *The King v. Winstanley* was, how much of the estate was exempt from the auction duty. If a mortgagee does not concur in a sale, he is entitled to receive his debt in full, and therefore, when lands in mortgage belonging to a bankrupt are sold, if the duty is to be paid, it must fall upon the residue, which is the bankrupt's estate, and which is exempted from duty by the bankrupt acts.] That case shows that the whole of the estate remains in the mortgagor. [*Alderson* B. The decision was come to upon a question of exemption, but you are wishing to use it in support of a charge. Lord *Abinger* C. B. Where both the mortgagor and the mortgagee concur in the sale of an estate, there is no doubt the whole is sold; and if in the present case the mortgagee had concurred, the whole of the estate would have been liable to the duty.] In equity a mortgagee in possession is considered merely as a trustee for the mortgagor. [*Alderson* B. The estate here is subject to 10,200*l.* of the mortgage, and an indemnity is taken by the purchaser against the remainder of the charge. *Parke* B.

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(a) See 5 Bligh, N. S. 130; 2 Dow & Glark, 302.

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The whole difficulty of the case arises from the obscure manner in which it is stated. If the vendee was to pay the vendor 15,500*l.* and the latter was to exonerate him from the mortgage, then it was a sale to that amount, but if he was to pay only 5300*l.*, it was a purchase for that sum.] The present case is the same as if the parties had agreed to allow a part of the purchase-money to remain on mortgage. [Lord *Abinger* C. B. That would have been only another mode of payment.] The parties have put their own construction upon the sale, for a deposit of ten per cent. has been paid upon the whole 15,500*l.* [*Parke* B. There certainly is an obscurity arising from that circumstance, and from the purchaser agreeing to pay 15,500*l.*] One party has sold that for which he is to receive 15,500*l.*, and the other has bought that for which he is to pay the same sum. The vendor might have offered merely the equity of redemption for sale, but he has put up the whole estate.

Sir *W. W. Follett* contra, was stopped by the Court.

LORD ABINGER C. B.—If there was any difficulty in this case as to what was sold, the ambiguity has been cleared away by the admission, that the real intention was to sell the equity of redemption, and that the mortgage was to remain charged upon the property. That being so, the question is reduced to this. If a man sells an equity of redemption, is he bound to pay the auction duty on that which he does not and cannot sell, namely, the mortgage debt? The case appears to me to require no argument.

PARKE B.—The only doubt that I have felt, is from the obscurity, in the special case, with respect to the

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sum to be paid by the purchaser to the vendor; but I understand it now to be admitted, that the only sum to find its way from the former to the latter, was the sum of 5300*l.*, the amount to be paid for the equity of redemption. If that be so, and the purchaser takes the estate subject to the mortgage, for which by contract with the mortgagor he is to pay 10,200*l.*, then the purchase-money in reality is only 5300*l.* for the equity of redemption, which is all that the vendor is capable of selling. It would have been a different contract if the agreement had been, that the party should pay 15,500*l.*, that is to say, should take the estate at 15,500*l.*, and out of that sum pay off the mortgage. The case is certainly obscure, for it states that the contract the purchaser entered into was to pay 15,500*l.*, and that he paid a deposit upon that sum, he being by the stipulations of the sale to make a deposit on the purchase-money, and such payment looks very much as if the purchase-money was 15,500*l.* But the contract refers to the conditions of sale, from which it appears that the purchaser has only bought the equity of redemption, and that the apportioned mortgage money upon the lot being 10,200*l.*, there is to be a mutual charge and indemnity for effecting the apportionment and indemnifying the parties; the vendee contracting with the vendor to pay that sum to the mortgagee, while he is to be indemnified by the vendor, if the latter retains the remainder of the estate, or by the purchasers of such residue, against the rest of the mortgage. The real contract then is, that the vendee is to pay to the vendor 5300*l.*, and to pay to the mortgagee 10,200*l.*, when the latter is bound to receive the money. With regard to the deposit being paid on the 15,500*l.*, instead of on the 5300*l.*, although that circumstance causes some obscurity, I do not conceive that it alters the case.

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ALDERSON B.—It seems to me that when the facts of the case are relieved from obscurity, that the decision at which the court should arrive is perfectly clear. Here the mortgagor sells subject to the mortgage; the mortgagee does not concur in the sale, which is therefore only a sale of the interest of the mortgagor, and it is upon the purchase of such interest that the auction duty attaches. The question would have been entirely different if the two had concurred in the sale; they would in that case have sold, and the duty would have been chargeable upon, the whole estate; for if they both take advantage of the sale, they must both pay for the benefit. But here the mortgagor only sells; the mortgagee is passive; he insists upon having his rights entire, whether the sale goes on or not; and all which the mortgagor undertakes to sell, is the equity of redemption of the estate subject to the mortgage. Although the document to which the vendee put his signature states that he has purchased the lot for 15,500*l.*, yet it refers to the particulars of sale, which show that the lot is charged with an apportioned part of the mortgage, which the mortgagee refused to accept; and it is perfectly clear that the purchaser is to pay the sum so apportioned to the mortgagee at a future time, and that he is to be indemnified against the rest of the mortgage. It is obvious therefore that the vendee in effect only bought the equity of redemption, though he cannot purchase it in that form, as the mortgage is entire, and extends over the whole estate. Consequently it appears to me that all which the one party has sold, and the other has purchased, has been sold for 5300*l.*, and that the auction duty ought to be calculated upon that sum.

GURNEY B.—All that the vendee has purchased, is



the equity of redemption for the sum of 5300*l.*, and it is upon that sum that the duty should be charged.

Judgment for the defendant.

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PARKER *against* GOSSAGE.

**ASSUMPSIT.** The declaration stated, that heretofore, to wit, on &c. by a certain agreement then made between the plaintiff of the one part, and the defendant and one *Alfred Fardon*, since deceased, of the other part, the defendant and *A. F.* agreed to sell, and the plaintiff agreed to purchase, all the salt of every description that might be manufactured or raised at certain salt works of the defendant and *A. F.* described in such agreement. And it was then further agreed between the parties in and by the same agreement, that all salt from the said works should be sent on account of the plaintiff, and entered and invoiced accordingly; and that the prices to be charged for manufactured and rock salt should be fixed monthly by the parties, and that the plaintiff should be entitled to a commission on these prices, equal to one-fourth of the difference of these prices and the costs of each kind of salt to the defendant and *A. F.*; and it was then further agreed between the parties, in and by such agreement, that one-fourth part of all losses incurred by bad debts should be borne by the plaintiff, and the remaining three-fourths by the defendant and *A. F.*; and the plaintiff thereby bound himself to use all diligence in promoting the sale of salt. But it was then further agreed betwixt the parties in and by such

Where *A.* and *B.* entered into a written agreement, the one to purchase, and the other to sell all the salt made at the salt-works of *B.* for fourteen years; but it was provided that bankruptcy or insolvency on the part of *A.* should terminate the contract:—

Held, on demurrer, that the word insolvency was used in its natural and not in its artificial sense, and that the contract was put an end to by *A.* being unable to pay his debts, although he had not taken the benefit of the insolvent act.

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agreement, that he should not be required to take a greater quantity than he could sell to the advantage of the said parties; and that all payments connected with the trade should be made quarterly, and the books balanced, and any amounts then due to either of the parties from the other of them, should be immediately paid over by his or their accepted bill of exchange not exceeding three months; and it was then further agreed between the parties, in and by such agreement, that an account of all salt sent from the said works should be forwarded daily to the plaintiff, or otherwise, as he might direct, and that invoices should be sent to his customers, the plaintiff providing the blank forms for the same, and that his account should be kept as might be most agreeable to him; and it was then further agreed by the parties, in and by the agreement, that all books, papers, bills, and accounts of every description, connected with the manufacture or the sale of salt at the said works, or expense of raising rock, should at all times be open to the inspection of the plaintiff, and that he, equally with the defendant and *A. F.*, should have free access to the office and the whole of said salt works; and it was then further agreed between the parties, in and by such agreement, that the defendant and *A. F.* should not barter or give away any rock or manufactured salt or brine, and that the plaintiff should not be connected with the manufacture or selling of salt, except as provided in that contract during the continuance thereof, without permission in writing from the defendant and *A. F.*; and it was then further agreed between the parties, in and by such agreement, that the agreement should continue binding for the term of fourteen years from the 10th day of *October* then next ensuing, but that the plaintiff should have the liberty of abandoning that contract, and should be released therefrom at

any period during the said term, he having previously given six months' notice, in writing, of his intention of abandoning the agreement, to the defendant, and *A. F.*; and that bankruptcy or insolvency on the part of the plaintiff should terminate the contract; and that if the plaintiff should be affected with any affliction or disorder of the mind, of such a nature as to incapacitate him from conducting the business according to the terms and spirit of the said contract, it should be considered void, and terminate accordingly. Three breaches of the agreement were averred:—First, that the defendant did not sell to the plaintiff all the salt manufactured at the said salt-works; secondly, that the defendant had sold to other persons; and, thirdly, that the defendant had refused to permit the plaintiff to inspect the books, &c. To the first breach assigned in the declaration, the defendant pleaded, that before &c., to wit, on &c., the plaintiff was insolvent and unable to pay and discharge his just debts, whereby and by virtue of the terms and conditions of the said agreement in that behalf, the said contract in the declaration mentioned terminated, and the defendant did then and before &c. rescind and annul the same accordingly, of which the plaintiff then had notice. A similar plea was pleaded to the two other breaches. Replication to the three pleas:—That the plaintiff never applied by petition, or in any other way, to any court, or person or persons, for his discharge from custody, under the provisions or enactments of any statute passed for the relief of insolvent debtors. Demurrer and joinder.

Sir *W. W. Follett* appeared to support the demurrer, but the court called upon

*E. V. Williams* to sustain the replication. The word

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“insolvency” in this agreement, means, technically, a person who has taken the benefit of the insolvent act. It will be conceded that the term bankruptcy is used in its artificial sense, and therefore, according to the maxim *noscitur à sociis*, the word insolvency is also used in the same sense. Wherever the legislature employs the terms bankruptcy and insolvency, they are used in their artificial and not in their natural sense. Thus in the last act relating to savings’ banks, 3 & 4 W. 4. c. 14., the 27th section provides against any officer becoming a “bankrupt or insolvent;” and afterwards adds the case of his making an assignment for the benefit of his creditors. So in the 12th section of the 4 & 5 W. 4. c. 40., consolidating the laws relating to friendly societies, the words “bankrupt or insolvent” are used in the same technical sense; and the clause, like that in the savings’ bank act, goes on to provide against an assignment for the benefit of creditors. So in the general turnpike act, 4 Geo. 4. c. 95. s. 36. where the words are, “sale, assignment, bankruptcy, insolvency, or otherwise;” insolvency is used in its artificial and not in its natural sense. *In re Birmingham Benefit Society* (a) the Vice-Chancellor held, that the word insolvent in the 33 Geo. 3. c. 54. s. 10. meant a person who had taken the benefit of the insolvent debtors’ act, and not one who had merely made an assignment of his effects for the benefit of his creditors. [*Parke B.* The natural import of the word insolvency, is a man unable to pay his debts; but in those statutes the context shows that the expression is used in its technical sense; here the term bankruptcy is the only thing to indicate that insolvency is not employed in its natural sense.] It is said, that it is a hard case to be obliged to go on dealing with a person who is insolvent, but a party in trade is always subject to risk, and in

(a) 3 Simons, 421.

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the present case the risk is not great, as by the agreement a balance is to be struck every three months, and a bill given by the plaintiff for the amount due from him. If such bill be not paid, the defendant may make the plaintiff a bankrupt, and so get rid of the contract. Where one construction would be convenient, and the other inconvenient, the court may fairly be asked to adopt the former. If such an agreement as this is held to be terminated only by the party becoming bankrupt or insolvent, using these words in their technical sense, then it will be a matter of certainty when the contract is determined. But the greatest uncertainty will prevail as to whether it continues or not, if it be decided that it ceases as soon as the individual falls into insolvent circumstances; for owing to the fluctuations of trade, a man may be solvent to-day and insolvent to-morrow, and the other party may continue to deal with him for years after an end has been put to the contract. [*Parke B.* According to your view the defendant is bound to sell all his salt to the plaintiff, be he ever so insolvent, and the only remedy that you can point out is, that the former may get rid of the contract by making the plaintiff a bankrupt.] The arguments urged against holding insolvency to be used in its technical sense would have applied as well to bankruptcy, if it had stood alone. [*Lord Abinger C. B.* The natural meaning of bankrupt is, made a bankrupt according to law.] The word bankrupt was well known in the language before the passing of the first bankrupt act, 34 & 35 *Hen. 8. c. 4.* That statute did not use the word, except in the title. It was employed in the body of the 13 *Eliz. c. 7.*, because it had then acquired a technical sense. [*Parke B.* Instead of natural, suppose you say ordinary sense. Now a bankrupt, in the ordinary sense of the term,

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means a bankrupt according to law; but insolvency, in its ordinary sense, means no such thing.] At any rate the plea of the insolvency of the plaintiff does not apply to the breach in the declaration, for refusing to allow him to inspect the defendant's books. [*Parke B.* The agreement is put an end to altogether by the plaintiff's insolvency; and if you had wished it to continue for some purposes, you should have provided for that when it was made.]

*Williams* then denying that the plaintiff was insolvent, applied to amend, which the court (a) gave him leave to do, on payment of costs, and on producing an affidavit from the plaintiff that he was not in insolvent circumstances.

(a) Lord Abinger C. B. *Parke, Alderson, and Gurney B.*

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### THORNES *against* WHITE.

A party on taking the benefit of the insolvent act, swore that certain goods, described in her schedule, belonged to the creditors of her deceased husband; but afterwards brought an action to recover them, claiming them as her

own. Held, that the fact of her so swearing, and afterwards setting up a right to the goods in herself, was an inconsistency for the consideration of the jury; but that such oath did not estop her from asserting her claim.

**T**ROVER for various articles of household furniture.

Pleas: not guilty, and a denial of the plaintiff's possession. At the trial before *Littledale J.* at the last *Surrey* summer assizes, it appeared that the plaintiff was the widow and executrix of one *Richard Thorne*, who died in 1826 in embarrassed circumstances. The goods claimed by the plaintiff were deposited in 1831 with the defendant in order to be taken care of, and had remained in his custody down to the time of bringing the action. They were proved in evidence to have belonged principally to the plaintiff's husband,

but among them were several articles which she herself had purchased. Some time in 1832 a Mr. *Glanvil*, who was the principal creditor of *Richard Thorne*, filed a bill in equity against the plaintiff to compel a proper distribution of the testator's effects. A decree was made in the suit, and the plaintiff being condemned in costs, for which an attachment issued against her, she was committed to prison. On 21st May 1834 she petitioned the insolvent court for her discharge, and in the schedule filed by her on that occasion she made the following statement:—"There are some household goods at Mr. *Edward Thorne*, of *Wyndham Place, Camberwell*, which were used by me, but the same belong to the creditors in the suit of *Glanvil v. Thorne*. There is some other furniture at Mr. *White's*, of *Sydenham*, butcher, which also belongs to the said creditors." At the hearing of her petition she was opposed by Mr. *Glanvil*, and a discussion arose with respect to the parties who were entitled to the goods at *Sydenham*, but ultimately the opposition was withdrawn, upon the plaintiff's attorney paying into court 10*l.* on account of the furniture at *Camberwell*, and 4*l.* for that at *Sydenham*; whereupon the plaintiff was declared entitled to the benefit of the insolvent act, and was sworn to her schedule. *Steer*, for the defendant, objected at the trial, that the plaintiff having described the goods in the schedule as belonging to her husband, was precluded from setting up a title to them in herself; but the learned judge thought, that as regarded the goods which she had purchased, that the case ought to go to the jury, and that the plaintiff was not bound by the statement made in her schedule. The jury having found for the plaintiff,

*Steer* now moved, with the leave of the learned judge, to set aside the verdict and enter a nonsuit.

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He contended that the plaintiff having attempted to prevent the goods at *Sydenham* coming within the operation of the assignment for the benefit of her creditors, was precluded by the oath she then took from afterwards claiming them as her own. [*Parke* B. How is she estopped by her false oath? It was only evidence to go to a jury. It is quite clear she was not precluded from afterwards denying her former statement.] She could derive no property in them from the provisional assignee if they belonged to her husband, [*Gurney* B. The insolvent court must have decided these goods were her's, as the provisional assignee sold them to her.]

The Court (Lord *Abinger* C. B., *Parke*, *Alderson*, and *Gurney* Bs.) held, that the fact of the plaintiff's swearing that the goods belonged to her husband's creditors, and afterwards claiming them as her own, was an inconsistency for the consideration of the jury, but that she was not estopped by her oath from setting up a right to the goods in herself.

Rule refused.

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#### CREASE *against* BARRETT.

The party who succeeds at a second trial will not be allowed in taxation the costs he has incurred for copies of a short-hand writer's notes of the evidence given at the former trial.

**S**IR *W. W. Follett* had obtained a rule calling upon the master to review his taxation of costs in this cause, he having refused to allow the plaintiff the sum of 90*l.*, which he had paid for three transcripts of a short-hand writer's notes of the evidence adduced at a former trial between the same parties, which took place at the

The proper course for a party who wants a transcript of the evidence adduced at the former trial, appears to be to apply to the clerk of the judge who presided for a copy of such judge's notes, and the expense of obtaining such copy would, it seems, be allowed in costs.



*Westminster* sittings after *Trinity* term 1834, before Lord *Lyndhurst* C. B. and a special jury, when a verdict was found for the plaintiff. A new trial was granted by the court in *Hilary* term 1835, but the action was subsequently compromised, and a verdict taken for the plaintiff by consent for the smaller toll of tin which he had claimed to recover.

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*Erle* now showed cause. It is impossible to maintain that copies of all the evidence given at the former trial could be required for the counsel at the second trial, particularly of the documentary evidence, which in all probability had been transcribed previously to its being adduced. The officers of the different courts have always refused to allow such costs as the present.

*Follett* contra. The question is, whether the plaintiff shall be allowed the costs incurred by him for copies of the short-hand writer's notes, and that depends upon whether these were necessary for the proper conducting of his case at the second trial. There can be no doubt it was requisite that his counsel should be furnished with transcripts of what passed at the former trial, in order that they might determine what evidence ought to be admitted. [*Parke* B. If these costs were allowed in the present case, it would open a door to similar applications.] There were peculiar circumstances in this case which distinguish it from all others, and which made it important to have transcripts of the short-hand writer's notes. [*Parke* B. A copy of such part of the evidence as was necessary might have been obtained from the lord chief baron's clerk, and there is no affidavit that any application was made to him.] It was conceived that if it had been applied for, a copy of his lordship's notes would not have been granted.

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[*Alderson* B. I have given a copy of my notes several times. *Parke* B. I shall never make any difficulty in granting a transcript of mine.] It is not suggested that the supplying of these copies of the short-hand writer's notes to the counsel was not done *bonâ fide*. There was a great deal of documentary evidence given in the case, and part of the documents put in came from the defendant.

PARKE B.—The utmost that could be allowed would be an attendance upon the lord chief baron or his clerk, in order to procure a copy of his lordship's notes, and it would not be worth while to direct an inquiry as to what allowance ought to be made for such an attendance.

The other barons concurred.

Rule discharged.


DOE on the several demises of RICHARD LAMB, and BOYDELL and Another, *against* GILLETT and Another.

In order to support a security made by an insolvent to a creditor within three months before he is committed to prison, it is not necessary for the latter to prove pressure by him of the insolvent. It is for the assignees of the insolvent, who seek to avoid the security under the provisions of the 7 G. 4. c. 57. s. 32., to make out that it was the voluntary act of the insolvent.

EJECTMENT. This was an action brought by the assignees of an insolvent of the name of *Richard Lamb*, against the defendants, who were bankers at *Banbury* in *Oxfordshire*, to recover two copyhold messuages situate at *Adderbury*, in the same county. At the trial before *Williams, J.* at the last *Oxford* assizes, the following facts appeared in evidence. The insolvent had been a corn-dealer at *Adderbury*, and had kept a banking account with the defendants for some years, and in *July* 1833 was indebted to them

for the sum of £1000. The defendants sought to avoid the security under the provisions of the 7 G. 4. c. 57. s. 32., to make out that it was the voluntary act of the insolvent.

for money advanced to the amount of 700*l*. In that month he, with his brother as his surety, executed a warrant of attorney to them for 1000*l*., in order to secure the 700*l*. and an additional sum of 300*l*., which the defendants then agreed to advance. A lease of a house belonging to the insolvent's brother was also given up to the attorney employed by the defendants on that occasion, which lease still remained in their possession. The insolvent at that time objected to charge his property at *Adderbury*, lest the circumstance should acquire publicity there, but told the attorney that if *Gillett* should require it at any time, he and *Gillett* could settle it. In *August* and *September* *Gillett* wrote the two following letters to the insolvent, which were put in on the part of the assignees.

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“ *Banbury* 22d, 8th month, 1833.

“ Respected friend, *Richard Lamb*.

“ Thy letter of yesterday is received this morning, and the 100*l*. will be ordered to be paid to thee by this night's post. On looking over thy brother's lease I see the original cost of it was only 157*l*. 10*s*. I therefore think the securities we have at present are insufficient looking at the state of thy accounts; I should therefore wish thee on thy return to make over thy houses at *Adderbury* by a deed, as also thy reversionary interest in *J. Williams's* estate. I mention this for thy consideration before I see thee. I remain, &c.

“ *J. A. Gillett.*”

“ *Banbury* 24th, 9th month, 1833.

“ Respected friend, *Richard Lamb*.

“ I called upon *B. Aplin* yesterday, and consulted him respecting the security to be given by thee to the bank. It seems that the necessary documents can be prepared in *London*, without exposing the matter to *B. Aplin's* clerks here. He referred to the court rolls, but there did not appear to be more than one house belonging to thee. I thought there had been another besides the one thou occupiest. With respect to thy reversionary interest as one of the residuary legatees under the late *J. Williams's* will, *B. Aplin* says it will be

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necessary for the executors to have notice respecting it when the security is given. *B. Aplin* left here for *London* last night, and is likely to remain in town about a week, so I thought it would be better for thee to call upon him at his office there; and I told him I would write to thee to do so, and if thou hast a copy of *J. Williams's* will thou hadst better take it with thee, as he will want to see it. I think his office is No. 5, *Furnival's Inn, London*. I suppose thou art aware that thy account, including the bill that was returned a few days back, exceeds the amount stipulated to be advanced as the maximum, 150*l.*; this sum thou wilt perhaps be able to remit in a few days. I am, &c.

"*J. A. Gillett.*"

The *Mr. Aplin* mentioned in *Gillett's* letter, and who was the regular attorney of the defendants, was examined on their behalf, and he swore that he saw the insolvent at his office in *London* on the 1st *October* 1833, who told him that he had agreed to give security to *Gillett* on his houses at *Adderbury*. On the 7th *December* the insolvent surrendered the premises in question to the defendants, and on the 23d *January* 1834 he was arrested for debt and went to prison, when he petitioned the Insolvent Court, and obtained his discharge on the 25th *March* following. For the assignees it was contended, that the surrender to the defendants was fraudulent and void, as against them, under the provisions of the 7 *Geo. 4. c. 57. s. 32 (a)*, being voluntary on the part of the insolvent, and having been made within three months before he was committed to prison. The counsel

(a) By this section it is enacted, "That if any prisoner, who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as

for the defendants relied on the letters of *Gillett* as evidence of pressure by their client. The jury having found for the defendants,

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*Talfourd*, Serjt. now moved for a new trial. He contended that the surrender made to the defendants by the insolvent was voluntary, as the letters of *Gillett* produced at the trial, contained no evidence of pressure by the defendants, in order to obtain a security for their debt. There was no proof of any threat by them of legal proceedings; on the contrary, the letters showed that the parties were upon the most friendly terms.

PARKE B.—It was not necessary for the defendants to prove pressure by them of the insolvent. It was for the assignees to make out that the surrender was the voluntary act of the insolvent; and in order to defeat this security they should have shown that the act originated with him. The inference that I should draw from the evidence given at the trial is, that the assignment of the property was not voluntary on his part. There are some cases upon this subject, which are not quite satisfactory (a).

BOLLAND, ALDERSON, and GURNEY Bs. concurred.

Rule refused.

against the provisional or other assignee or assignees of such prisoner under this act. Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under this act."

(a) See *Herbert v. Wilcox*, 6 Bing. 203; *Sharpe v. Thomas*, 6 Bing. 416; *Cooke v. Rogers*, 7 Bing. 438; *Arnell v. Bean*, 8 Bing. 87; *Corbould v. Broadhurst*, 1 M. & Rob. 189; *Morgan v. Brundrett*, 2 N. & M. 280; *Reynard v. Robinson*, 9 Bing. 717; *Thorpe v. Eyre*, 3 N. & M. 214; *Stackey v. Drew*, 2 Mylne & Keen, 190.

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A declaration stated that the plaintiff had bought of C. & Son certain goods for a sum mentioned, which the defendant had lent the plaintiff on his personal credit, without agreement for any lien on them in respect thereof; which sum the plaintiff paid to C. and Son, who accepted it in payment for the goods: yet that defendant falsely and wrongfully pretending that he was entitled to such lien, and had a right of preventing their delivery to the plaintiff till the said loan should be repaid, wrongfully and maliciously, and without rea-

sonable or probable cause in that behalf, but under colour of the said pretended lien, ordered C. and Son not to deliver the said goods to the plaintiff, but to keep them till they received further orders; in consequence whereof C. and Son refused to deliver them to him. Plea, that plaintiff never paid C. and Son: Held, on demurrer, that the action was maintainable, for after putting the averment of payment which had been traversed out of consideration, it appeared sufficiently that the defendant knew that there was no agreement for a lien on the goods, and that there was no obligation on C. and Son to deliver the goods to the plaintiff without payment; and that their refusal so to deliver the goods to the plaintiff arose from the defendant's statement, and the damage directly resulted from that act of his.

**C**ASE. The declaration stated that the plaintiff, before and at the time of committing the grievances by the defendant hereinafter mentioned, used and carried on the trade or business of a carpenter and builder, and had, just before the time of the committing &c., to wit, on 27th *June* 1835, purchased of *Cosser & Son*, and C. & Son had then sold to the plaintiff a certain large quantity of wood, to wit, 200 spruce battins, to be used by plaintiff in his said trade or business, at and for 11*l.*, which said sum the plaintiff, at the time of the said purchase and sale, to wit, on &c., paid to C. & Son, who then accepted and received the same from the plaintiff in payment for the said spruce battins: and whereas also the defendant, at the time of the said purchase and sale, had lent and advanced to the plaintiff the said sum of 11*l.* for the purpose of making such payment, of which C. & Son had notice, and which said sum of money was so lent and advanced by the defendant to the plaintiff as aforesaid, upon the personal credit and responsibility only of the plaintiff, without any agreement then or at any other time, either before or afterwards, being made or entered into by or between the plaintiff and the defendant, that the defendant should have or be entitled to any lien on the said spruce battins in respect of the

said loan, or any power or control over the same, or any part thereof, as a security for the repayment of the said sum of money, or otherwise: yet the defendant well knowing &c., and intending &c., and to deprive the plaintiff of the possession, use, and benefit of the said spruce battins, and falsely and wrongfully pretending and assuming that he the defendant had and was entitled to a lien on the said spruce battins, and had then a right of staying and preventing the delivery thereof to the plaintiff until the said sum of money should be repaid, and falsely and wrongfully pretending that he the plaintiff was in embarrassed circumstances, and unable to pay and discharge his just debts, afterwards, and after the said purchase and sale of the said spruce battins by the plaintiff, and after the payment of the price thereof by the plaintiff, wrongfully and maliciously, and without reasonable or probable cause in that behalf, but, under colour of the said pretended lien and right of detainer, ordered and directed the said Messrs. C. and Son not to deliver the said battins, or any part thereof, to the plaintiff, but to retain and keep the same in their the said C. and Son's custody and possession, until they the said C. and Son received further orders and directions from the defendant concerning them: whereby, and in consequence whereof, the said C. and Son being then and there, by the means aforesaid, induced by the defendant to believe that he the defendant in fact had and was entitled to such lien as aforesaid upon the said spruce battins, and that the defendant had a legal right to make such order for the staying and preventing the delivery thereof to the plaintiff, did, in pursuance of the said order and direction of the defendant in that behalf, keep and retain the said spruce battins in their custody for a long space of time, to wit, for the space of three weeks then next following, without the con-

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sent and against the will of the plaintiff, and did during all that time absolutely refuse to give up or deliver the same or any part thereof to the plaintiff or his order, although the said C. and Son were, to wit, &c., requested by the plaintiff so to do: whereby and by reason of the committing of the said grievances by the defendant, the plaintiff was during all that time deprived of the possession of the said spruce battins, and of the benefit of the said purchase and sale thereof, and was thereby during all that time prevented from using the said spruce battins in his said trade or business of a carpenter and builder, and divers houses and buildings then erecting and building by the plaintiff were by reason and in consequence of the said detention of the said spruce battins by the said wrongful conduct of the defendant in the premises, during all the time aforesaid remained incomplete, and the work and progress thereof greatly delayed and retarded; and the plaintiff was, from the said want and absence of the said spruce battins during that time, wholly unable to proceed with or complete the said houses and buildings; and the plaintiff also was during all the time aforesaid, by reason of the committing the said grievances by the defendant, considered and believed by the said C. and Son, and by other good and worthy subjects of this realm, to be a person in embarrassed circumstances, and unable to pay and discharge his just debts, and the plaintiff hath been and is by means of the premises otherwise greatly injured &c. Damage, 200*l*.

Several pleas were pleaded, of which the third was as follows: the defendant says that the plaintiff did not pay the said price or sum, or any part thereof, to the said C. and Son, in manner and form &c., concluding to the country. Demurrer and joinder.

The matter of law intended to be argued for the



plaintiff in support of the demurrer was thus stated in the margin of the demurrer-book: that the non-payment by the plaintiff of the price of the spruce battens mentioned in the declaration to Messrs. C. and Son is no justification in law for the grievances in the declaration alleged to have been committed by the defendant. The defendant's points were these: that on the pleadings it does not appear that there is either wrong or damage sufficient to support the action; the wrong alleged being the ordering C. and Son not to deliver the goods to the plaintiff till further orders; but no legal obligation to obey that order appearing, and the expression of a wish to that effect not being actionable, C. and Son would be alone liable if they retained the goods without legal right. No misrepresentation is alleged as the ground of action, and if any assertion of a right to prevent the delivery of the goods can be implied, it would not sustain an action, being only the expression of an opinion not alleged to be to defendant's knowledge erroneous, and on which, if erroneous, it was the indiscretion of C. and Son to rely. No sufficient damage appears, for the plaintiff was not entitled by law to the delivery of the goods till the price was paid, and the plea denies that he paid the price. There is nothing to show that C. and Son, the vendors, would have delivered the goods, even if no order or direction had been given.

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*Wightman* for the plaintiff in support of the demurrer. The real question is, whether or not a sufficient cause of action appears on the declaration. [*Parke B.* Consider that question as if the averment of payment had been struck out of the declaration.] The plea which relates to that averment must be also taken to be struck out, so as to argue the case as if it were a demurrer to the declaration. The plaintiff is

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still entitled to some damages, the amount of which this court cannot adjudge. Neither *Vicars v. Wilcocks* (a), or *Ward v. Weeks* (b) apply, for it is here charged that the defendant himself, and not a third person, maliciously and under colour of a supposed lien on the goods, (thus setting up a title in himself,) and with intent to injure the plaintiff, directed C. and Son not to deliver them, and they accordingly refused to do so. The damage there was loss of credit, and resulted from the repetition by a third person of words spoken to him by the defendant. *Tindal* C. J. in the latter case places this point on its true ground: "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts, but such a spontaneous and unauthorized communication (as that from *Bryce* to *Bryer*) cannot be considered as the necessary consequence of the original uttering of the words. For no effect whatever followed from the first speaking of the words to *Bryce*; if he had kept them to himself *Bryer* would still have trusted the plaintiff. It was the repetition of them by *Bryce* to *Bryer*, which was the voluntary act of a free agent, over which the defendant had no control, and for whose acts he is not answerable. That was the immediate cause of the plaintiff's damage." C. and Son might well hesitate to take on themselves the decision of the question, whether a lien existed or not under the special contract, and were right in withholding the goods. In *Plunket v. Gilmore* (c), it was held in the King's Bench, on a writ of error from *Ireland*, that case lay by a vintner against the defendant for procuring men to come to the plaintiff's house, one being in woman's

(a) 8 East, 1, cited by *Hullock* B., 2 Y. & J. 397. Again, 7 Bingh. 212, explained 1 Adol. & Ell. 44, *Knight v. Gibbs*.

(b) 7 Bingh. 215.

(c) *Fortescue*, 211; 1 Mod. 215; Com. Dig. Action on the Case (A);

clothes and pretending to be a whore, and procuring them and the mob to call out a bawdy-house, so as to have it reputed as such, by which the mob broke the windows; for these acts made the plaintiff liable to a prosecution for a disorderly house, and would be evidence of it. The case resembles one of slander of title, which is supported by proof that what the defendant did prevented the sale.

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*J. Henderson* contra. Nothing is stated in this declaration which is inconsistent with the defendant's *bona fide* assertion, of a title which he believed himself to have. That is not actionable; *Gerard v. Dickson* (a). He is not alleged to have made that assertion, knowing it to be unfounded, and a mere allegation of malice is not sufficient, for the assertion must be, not mistaken only, but false within his own knowledge at the time he made it, in order to constitute a fraud in law, *Polhill v. Walter* (b). [*Parke B.* The averment, that the defendant falsely pretended that he was entitled to a lien, and wrongfully and maliciously, and without any reasonable or probable cause, and under colour of the pretended lien, ordered the goods to be detained, is a sufficient allegation of fraud in him.] It is averred that there was no agreement for a lien, and that the defendant knew that there was no such agreement; but it is not averred that he knew that he had no lien, and it is quite consistent with probability that a layman might think that he had a lien for the money which he had advanced to pay for the goods. The words "falsely and wrongfully pretending and assuming" &c. are general phrases which do not assist the case, for it is not alleged that the defendant pretended &c. to C. and Son; and the only wrongful act

(a) 4 Co. 8 a. Resolution 1st.

(b) 3 B. &amp; Adol. 114.

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charged against the defendant is, the ordering and directing C. and Son not to deliver the goods to the plaintiff. Such order and direction, if understood as an implied assertion of title, are not actionable, because it is not alleged that defendant knew that he had no title, and in any other sense amount only to a *gratis dictum*, a mere request or expression of opinion on which it was open to C. and Son to do as they pleased. At least, the wrongful act alleged is not actionable *per se*,—the plaintiff could not have maintained an action if C. and Son had never refused to deliver the goods. The declaration does not show any consequential damage, which can be fairly deduced as the natural, necessary, or legal result of the act of the defendant. *Morris v. Langdale* (a), was an action for saying of a jobber or dealer in stock, that he was a *lame duck*, (meaning that he had not fulfilled his contracts in respect of it.) The special damage alleged was, that certain persons named had refused to fulfil their contracts (specifying them) with the plaintiff in consequence of the words. Lord Eldon in delivering the judgment of the court said, that a great part of the special damage laid consisted in an allegation, that other persons did not perform their lawful contracts with the plaintiff. Now had he sustained any damage in consequence of such a refusal, it was damage which might be compensated in actions brought by the plaintiff against them, and the law supposed that in such actions the plaintiff would receive a full indemnity. In *Kearney v. Wakeock* (b), it was held, that an injury to the plaintiff for which damages are sought to be recovered, must be the legal and natural consequence resulting from the defendant's act, and not the tortious act of a third person induced by it. [Parke B. That

(a) 2 B. &amp; P. 284.

(b) *Supra*, 122.

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rule has been much questioned by Mr. Starkie in his very learned work on *Libel* (a). *Alderson B.* This case is quite different from *Ward v. Week*, where the wrongful act was that of a third person, who could not have justified it.] If, as stands admitted in these pleadings, C. and Son, the venders of the goods, had not been paid for them, the refusal to deliver was rightful; the plaintiff not having paid for the goods was not entitled to them, and cannot assert the non-delivery as a ground of legal damage. *Thompson v. Smith* (b). The plaintiff is not deprived of any right which he might enforce, or, to use the words of Lord Ellenborough in *Vernon v. Key* (b), "has he been deprived by deceitful means of any benefits which the law entitled him to demand or expect?" so as to entitle him to maintain this action. In *Ashley v. Harrison* (c), it was decided, that the proprietors of a theatre could not support an action against a person who libelled one of his female singers; by reason of which she was detested from appearing on the stage, the cause the right to sue would then depend on whether she had nerve so to appear or not; now, here the right to sue is rested on the choice of C. and Son, whether or not they would attend to the defendant's request. In *Tarleton v. McGawley* (d), it was held, that an action lay against the master of a vessel, for purposely firing a cannon at negroes on the coast of Africa, and thereby preventing them from trading with the plaintiff. *Alderson B.* The trading by the negroes was an act in their own option, and a

(a) 2d edit. vol. i. 205 and 206; Holt. See Starkie's Evidence, vol. 9, 466 n. 2d edit.; also the judgment of *Pyne v. Knight* in *Gibbs*, 12 Adol. Ell. 47.

(b) 12 East, 636, affirmed in Error, 4 Taunt. 488.

(c) Peake, 194; 1 Esp. 40, S. C. See *Taylor v. Neri*, 1 Esp. 386. Eyre C. J.

(d) Peake's C. N. P. 205.

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duty of imperfect obligation on them, while that of C. and Son to deliver their goods was one of perfect obligation on them, unless the averment of payment by the plaintiff be struck out, in which case no action would lie against them.]

*Wightman* in reply. The record admits the defendant's knowledge, that he had no lien, and that by his act and statement, charged in the declaration to be malicious, C. and Son refused to deliver the goods, for he has taken no issue on that allegation. It is not pleaded that the reason of C. & Son's refusal to deliver the goods was, that they were not paid for, but that they were induced by the defendant's false assertion to refuse to deliver them to the plaintiff. In *Newman v. Zachary* (a), the plaintiff declared against his shepherd, for that he maliciously contriving to disgrace the plaintiff, and knowing that certain sheep, mentioned in the inducement to be the plaintiff's own, falsely and fraudulently affirmed to the bailiff of the manor which had waifs and strays belonging to it, that the sheep was an estray, whereupon the bailiff seized it, to his damage. Verdict for plaintiff; and though *Lalor* argued that there was no cause of action, stating as one ground that the defendant's words cannot damage the plaintiff, for he shall have his remedy against the bailiff of the manor that seized his sheep wrongfully; but it was held, that the action would lie, because the defendant by his false practice had created a trouble, disgrace and damage to the plaintiff; and though the plaintiff have cause of action against the bailiff, yet this will not take off his action against the defendant

(a) 22 Car. 1, Aleyn, 3, cited Bac. Ab. Action on the Case, (B.) 1 vol. 92; and see the argument in 3 Burr. 1348; *Payne v. Beaumorris*, 1 Lev. 248; *Fitter v. Veal*, 12 Mod. 542; Bull. N. P. 7; 1 Roll. Rep. 35; Com. Dig. tit. Action on the Case for Defamation (D. 80.)

in respect of the trouble and charge that he must undergo in the recovery against the bailiff; and *Hale*, arguendo (a), put a case, that if one slander my title whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him who caused the disturbance. [*Alderson* B. The declaration does not allege that had it not been for the defendant's malicious act, C. and Son would have delivered the goods to the plaintiff.]

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**PARKE B. (b)**—This is in substance an action for a false representation; and though the defendant claimed a property in the goods, yet, as appears from the case of *Gerard v. Dickenson* (c), which has been cited, and also from *Lovett v. Weller* (d), this action is maintainable, provided it is shown that the defendant made such claim without reasonable and probable cause, and that special damage accrued from the claim so made. The question is, whether the declaration discloses these necessary facts. [After referring to the declaration, his lordship proceeded.] It appears clear to me, that this declaration sufficiently alleges that the defendant knew there was no agreement for any lien by him on those battins, and that he falsely pretended that he had a lien, that is, he acted without probable cause in giving the information he did to C. and Son. These facts appear on the declaration. The plea is, that the plaintiff never paid C. and Son for the goods; to which there is a general demurrer. Laying out of consideration the averment in the declaration, that the plain-

(a) See names of counsel prefixed to *Aleyn*, 3.

(b) Lord *Abinger* C. B. was sitting in equity; *Bolland* B. had gone to chambers.

(c) 4 Rep. 18 a.

(d) 1 Roll. R. 309; see *Cro. Jac.* 164; and other cases collected, 4 Rep. 18 a. note (c).

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tiff paid for these goods, which is traversed by the plea, and the truth of the traverse is admitted by the demurrer, the next question is, whether the payment of special damage in the detention of the goods by C. and Son, is sufficiently connected with the supposed wrongful act by the defendant previously laid in the declaration? Now, the matter there stated, appears to me to afford them sufficient reason for detaining these articles in their hands. It was argued, that they were under an absolute obligation by contract to deliver them, and that they would be liable to an action by the plaintiff for not doing so; in which case the plaintiff ought to take his remedy against them, and could not recover special damage in this action; in support of which position the case of *Vickers v. Wilcocks*, and the dictum of Lord *Ellen* in *Morris v. Langdale*, were cited. Were it necessary to consider those cases, we should be inclined to take time in order to give them full consideration, as we are not without some doubt as to their authority; but I find nothing on the declaration, if the payment of the price be omitted, like an obligation binding on C. & Co. to deliver the goods to the plaintiff. We must assume upon these pleadings that they were under no such contract, and that their refusal to do so arose directly from the defendant's statement made without reasonable cause, and that the damage of not delivering the goods resulted directly from that act of the defendant.

**ALDERSON and GURNEY B.** concurring,

**Judgment for the plaintiff.**



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**LESTER, Assignee of MACKAY an Insolvent, against  
LAZARUS.**

**THIS** was an action by the assignee of an attorney, who had taken the benefit of the insolvent debtors' act, for work done by the insolvent as an attorney. At the trial before the under-sheriff of *Middlesex* the plaintiff gave in evidence a duplicate original of a bill signed by the attorney, which was objected to on the part of the defendant, as not being a sufficient bill within the provisions of the 3 *James* 1. c. 7. and 2 *Geo.* 2. c. 23., inasmuch as it did not state the court in which the business had been done. The under-sheriff overruled the objection, but gave the defendant leave to move to enter a nonsuit, if the court should be of opinion that the bill delivered was not a proper bill. The plaintiff having recovered a verdict, *Mansel* on a former day obtained a rule nisi; against which

*Mahon* now showed cause. If it were necessary in this case for the plaintiff to deliver a bill, this was a proper bill, for the defendant could not be misled by its omitting to state the court, since it was sworn at the trial by the clerk of the plaintiff's attorney, that the defendant when arrested was brought to the attorney's office, where he admitted that the business had been done, so he must have known the court in which the proceedings had taken place. In *Williams v. Barber* (a) it was decided that a bill was not vitiated by a mistake in the date of items which could not lead the party into error. But the plaintiff need not have delivered a bill at all. The 2 *Geo.* 2. c. 23. s. 23. does not extend to any other party than the attorney himself; neither exc-

The provisions of the 3 *Jac.* 1. c. 7. s. 1., and 2 *Geo.* 2. c. 23. s. 23. do not extend to the assignee of an insolvent or bankrupt attorney, who may sue for business done by such attorney without delivering a signed bill to the client. Under the 3 *Jac.* 1. c. 7. a bill signed by the attorney is sufficient, without specifying the court in which the business is done.

*Quære*, if it is not also sufficient under the 2 *G.* 2. c. 23. s. 23.?

(a) 4 Taunt. 806.

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cutors nor assignees are mentioned in it; and, with regard to the former, it has been expressly held that they are not bound to deliver a bill according to its provisions (a). An assignee stands precisely in the same situation as an executor, and like him can have no personal knowledge of the court in which the business has been done. [*Parke B.* This case seems to me to fall within the principle of executors who are deprived by the death of their testator of the power of delivering a bill. Here, if the bill delivered be insufficient, it amounts to no bill at all, and the assignee cannot force the insolvent to deliver another.]

*Mansel* contra. The present case is distinguishable from that of an executor, for the insolvent is still in existence and may sign a proper bill; but where an attorney dies the statutes are dispensed with, on account of the physical impossibility of complying with their requisites. An insolvent may be compelled by the insolvent commissioners, before he obtains his discharge, to render a correct statement of his affairs, and to do all acts that may be necessary to make his estate available to his creditors. By the 3 *Jac.* 1. c. 7. s. 1., attorneys shall give a true bill unto their clients of their charges concerning the suits they have for them, subscribed with their own hands and names, before they shall charge their clients with the same. Under this statute no debt accrues until a bill is delivered, for the giving of a bill is made a condition precedent to the client being charged. If the debt was not perfected in this case it would not pass to the assignee, since he only takes that which was vested in the attorney at the time of his insolvency, to which his client was no party.

(a) See *Spink v. Hare*, 1 Barnard. 433; *Willis v. Nicholson*, Andr. 276, Bull. N. P. 145; *Barrett v. Moss*, 1 C. & P. 3.

[*Parke* B. Your argument applies equally to executors. *Alderson* B. And according to it, if an attorney dies, his debt is lost.] This bill is clearly defective under the 2 *Geo. 2. c. 23. s. 23.*, in not stating the court in which the business was transacted. That statute requires the attorney to deliver a signed bill a month before he commences his action, in order to enable the client, if he thinks proper, to have it taxed. Consequently the bill should state in what court the business was done, that the client may know to what officer he must apply to have the bill so taxed.

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*PARKE* B.—It seems to me that the present case falls within the principle of the decisions in which it has been held that the 2 *Geo. 2. c. 23. s. 23.* is a personal prohibition, preventing only the attorney himself from suing, and not extending to his executor or administrator. I am of opinion that the assignees of bankrupts or insolvents can not be required to deliver a bill under that statute before they commence an action. According to the defendant's counsel, the 3 *James 1. c. 7.* provides that no debt shall accrue until a bill has been delivered. If that were so, the executors or administrators of attorneys would have no remedy for the professional debts due to their testators; but such a construction of the act cannot be maintained for a moment. Supposing, however, that were the true meaning of the statute of *James*, no difficulty would arise here, as there has been a bill delivered sufficient to satisfy the provisions of that act. The objection to this bill must therefore arise, if at all, under the 2 *Geo. 2.* It is said that inasmuch as the latter statute requires a bill to be delivered, in order to enable the client to have it taxed, that such bill ought to state the court in which the business was done, and that consequently this bill is defective in not specifying the court where the pro-

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ceedings took place. This brings us back to the question, does the 2 Geo. 2. apply to the present case? That statute has been held not to extend to executors, but to be merely a personal prohibition, on the ground that otherwise the debt would be lost, as the representatives are prevented by a physical impossibility from delivering a bill before they commence an action. The same reasoning is applicable to the case of assignees. It is urged that they are under no physical impossibility, but in many cases there may be very great difficulty in their obtaining the necessary bills from the parties whom they represent. They would be exposed to the refusal of the bankrupt or insolvent, on whom it would depend whether they should recover what was due to his estate. An attorney may commit an act of bankruptcy and then go abroad, and so deprive his assignee of the means of compelling payment of his debts. As assignees therefore cannot be considered to be within the 2 Geo. 2., it is unnecessary to decide whether this is a sufficient bill under that statute.

BOLLAND B.—I concur in all that has fallen from my brother *Parke*. Were we to put any other construction on these statutes we should do great injustice to the creditors of this insolvent. He may have inserted all the debts owing to him in his schedule, but may not have had time to deliver the proper bills before obtaining his discharge under the insolvent debtors' act. According to the defendant's argument he would afterwards, if he chose to exercise it, have the power of preventing his assignee from recovering them.

ALDERSON B.—I am of the same opinion. I wish to have it understood that I by no means say that this is not a sufficient bill under the 2 Geo. 2. I find it no

where laid down in the statute that the name of the court must be stated, neither is there any thing in the act inferring that the court may not be ascertained by extrinsic evidence, as by an affidavit. With respect to the other point, I concur in the view taken by my brothers *Parke* and *Bolland*.

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GURNEY B.—I am by no means prepared to say that this would not have been a sufficient bill within the 2 Geo. 2. had the action been brought by the attorney himself; but it is unnecessary to decide the point, as I am clearly of opinion with the rest of the court, that the statute creates only a personal prohibition, and does not extend either to personal representatives or assignees.

Rule discharged.

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BAXTER against CLARKE.

MANSELL applied, under the 48 Geo. 3. c. 123. s. 1., for the discharge of the defendant out of custody, he having lain in prison upwards of twelve months, for a debt not exceeding 20*l*.

Rowe showed cause. The words of the statute "all persons in execution upon any judgment for any debt not exceeding the sum of 20*l*., exclusive of costs, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose in term time made to some one of his majesty's courts at *Westminster*, to the satisfaction of such court, be forthwith discharged out of custody by the rule or order of such court." The question is, whether the words "to

The words "to the satisfaction of such court" in the 48 G. 3. c. 123. s. 1., mean that the court is to be satisfied that the prisoner has lain in prison for twelve months for a debt not exceeding 20*l*., and matter not relating to those facts cannot be urged against the application for his discharge.

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the satisfaction of such court," do not mean that the court may look at facts beyond the sum for which the party was arrested, and the time he has been in prison. If such be their meaning, it is proposed to produce an affidavit on the part of the plaintiff, showing that he resorted to every other remedy before he had recourse to an arrest, as well as other grounds why this prisoner should not be discharged.

*Mansel* objected to the affidavit.

*Per Curiam* (a).—The words "to the satisfaction of such court" mean, that the court is to be satisfied of the truth of the facts mentioned in the previous part of the section, and the plaintiff cannot urge matter not relating to those facts against the application.

Rule absolute.

(a) Lord Abinger C. B. Parke, Alderson, and Gurney Bs.



### MILLIGAN *against* THOMAS.

In a cause tried before the sheriff under a writ of trial, it is not necessary, in applying for a new trial, to state the pleadings in the affidavits; for the writ of trial, like the *postea* in an action which has been tried before a judge, is assumed to be in court.

DEBT for goods sold and delivered. Plea, never indebted. At the trial before the under-sheriff of *Berkshire*, the defence set up was payment. The under-sheriff told the jury that it was a mere matter of credit between the witnesses for the plaintiff and for the defendant, and that they ought to find their verdict according as they believed the evidence on the one side or the other. The jury found for the defendant, and on a former day *Lumley* obtained a rule nisi for a new trial, on the ground that the defence was not admissible, there being no plea of payment on the record.

*Channell* now showed cause. This rule was obtained on reading the under-sheriff's notes and two affidavits, and in neither are the pleadings mentioned. The court, therefore, cannot take notice of the plea in this case, which, for all that appears, may have been a plea of payment.

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**PARKER B.**—It is not necessary, in applying for a new trial, either in a case before a judge or the sheriff, to set out the pleadings in the affidavits. In the former instance the *postea* is presumed to be in court; and, in the latter, the writ of trial, which is directed to the sheriff, who is, with respect to it, the officer of the court, must also be taken to be here.

*Per Curiam (a).*

Rule absolute for a new trial, the defendant having liberty to amend his plea, on payment of costs.

(a) Lord Abinger C. B. Parke, Alderson, and Gurney Bs.

### HARDING *against* JONES.

**ASSUMPSIT** against the defendant as the drawer and indorser of a bill of exchange. Plea, that the defendant never drew or indorsed the bill; on which issue was joined. At the trial before *Littledale J.*, at the last *Surrey* assizes, a witness of the name of *Simpson* was called to prove the drawing and indorsing

Assumpsit against the drawer and indorser of a bill of exchange. Plea, denying the drawing and indorsement.

At the trial

a witness for the plaintiff stated he had received letters from the defendant's place of business in the same handwriting as that in which the bill was drawn and indorsed. An offer to the defendant to compromise, after action brought, was also proved. For the defence three witnesses swore positively that the writing was not the defendant's. Held, that though the three witnesses for the defence rebutted the inference that the writing upon the bill was the defendant's, yet the offer to compromise was evidence recognizing the handwriting upon the bill, whether that of the defendant or of some other person, sufficient to go to a jury.

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of the bill. He had never seen the defendant write, but had received letters from his place of business, written in the same handwriting as that in which the bill was drawn and indorsed. The clerk of the attorney for the defendant was then called, who stated that the defendant had come to the attorney's office and offered terms of compromise. His testimony was confirmed by that of another witness. For the defence, three witnesses were produced, who swore positively that the handwriting in which the bill was drawn and indorsed, was not that of the defendant. The judge left the case upon this evidence to the jury, who found their verdict for the plaintiff.

*Platt* now moved for a new trial. Where the issue is whether a defendant drew and indorsed a bill of exchange, it is incumbent on the plaintiff to prove the handwriting to be the defendant's, or that of an authorized agent. Here there was not the slightest evidence, except the offer to settle. [Parke B. When was the offer made?] After the action was commenced, but before the defendant pleaded.

PARKE B.—I admit that by the three witnesses you called you rebutted the inference that the writing in which the bill was drawn and indorsed was the defendant's, but the proof given on the part of the plaintiff of the offer to compromise, was evidence recognizing the handwriting upon the bill, whether it was that of the defendant, or of some other person, and it was sufficient evidence to go to the jury.

The other barons concurred.

**Rule refused.**



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**WATERS and Others, Executors of WILLIAM WATERS deceased, against TOMPKINS.**

**ASSUMPSIT.** The first count was upon a promise by note for 50*l*. made by the defendant to W. Waters deceased, dated the 27th May 1824, and payable two months after date. The second count was upon a note for 100*l*. also made by the defendant to W. Waters deceased, dated the 29th July 1825, and payable 12 months after date. The third count was upon another note for 50*l*. made by the defendant to W. Waters deceased, dated the 12th September 1825, and payable two months after date. The fourth count was upon a note for 20*l*. and the fifth count upon a note for a like sum of 20*l*. both made by the defendant to W. Waters deceased, and dated the 6th March 1826, and the 25th April 1826, and respectively payable on demand. The sixth count was for money due to the deceased for money lent, for interest, and on an account stated. The seventh count was on an account stated with the plaintiffs as executors. Pleas: first, to the sixth and seventh counts, non assumpsit; secondly, to the whole declaration, the statute of limitations on which issue was taken. There were three other pleas, which it is not material to notice. At the trial before Gurney B. at the last Bristol assizes, the plaintiffs, to take the case out of the statute of limitations, called two witnesses of the names of Ann Comick and Eliza Waters, who were the daughters of Waters, one of the plaintiffs and nieces of the testator. The substance of their evidence will be found in the arguments of counsel and in the judgment of the court. It appeared that the occasion of their calling upon the defendant when the conversations took place with him respecting the interest on the money

Though a verbal acknowledgment of part payment of a debt, or of payment of interest thereon, is insufficient, within the 9 Geo. 4. c. 14. s. 1., to take the case out of the statute of limitations; yet if the payment of a sum of money is proved as a fact, and not by a mere admission, its appropriation to a particular account, whether in respect of principal or interest, may be shown by declarations of the party making the payment, and such declarations need not have been at the time of such payment.

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due from him to *W. Waters* deceased, was to receive the interest upon a sum of 40*l.* which had been lent to the defendant by one *Ann Flower*, who by her will (whereof *W. Waters* deceased, was one of the executors), bequeathed the same to another *Ann Flower*, afterwards *Ann Waters*, an aunt of the said *Ann Cowie* and *Eliza Waters*. After the case for the plaintiffs was concluded, the defendant's counsel objected, that there was no evidence to go to the jury, of interest having been paid on any of the promissory notes declared upon, but the learned judge overruled the objection, and the case was subsequently left to the jury, who found for the plaintiffs upon so much of the plea of the statute of limitations as related to the first three counts in the declaration, damages 230*l.* *Bompas Serjt.* having obtained a rule nisi why the verdict should not be set aside, and a new trial had,

*Erle* and *Crowder* now showed cause. The evidence given at the trial established that a payment of interest upon the promissory notes in question, had been made so as to take them out of the statute of limitations. It appears that on a given day there was an application to the defendant for interest, when he apologized for his wife, who generally acted for him, not having called on the testator to pay the interest upon the 200*l.* A payment by the wife to the deceased was afterwards shown, and that was evidence to go to the jury that the payment was on account of the interest of the 200*l.* The inference, arising from that payment, is further strengthened by the defendant's wife having subsequently made payments to the testator, and by the fact that on one occasion he complained that the interest was not kept down; which conversation could only have relation to the 200*l.* It is not suggested that any other

debt existed between the parties, to which these payments can be referred; and coupling the call of *Eliza Waters* with the subsequent payments by the defendant's wife, there was clearly evidence from which it might be inferred, that the payments were in respect of the £00l. *Eliza Waters* spoke to having received interest on several occasions upon the sum of 40l., which was important, as showing that the conversation she deposed to, and the subsequent payments to the testator, must have related to the £00l. [*Gurney B.* It occurred to me at one period of the trial that the 40l. was made up of the two notes for £0l., and that it was a distinct debt from the £00l.] The 40l. on which *Eliza Waters* and *Ann Cowle* received the interest, was independent of the £40l. sued for in this action, and consisted of the 40l. bequeathed by the will of *Ann Flower*; and the learned judge, in summing up, told the jury to dismiss from their minds the idea that it formed part of the £40l. The intention of the 9 Geo. 4. c. 14. s. 1. was to prevent parties from being charged by evidence of verbal declarations, which may easily be fabricated; but it is a very different case where there are words acknowledging that interest is due, followed by a payment, which may be connected with them. Words accompanied by an act, are not so liable to be misconceived, neither are they likely to give rise to perjury. [*Parke B.* Words, accompanied by an act, may lead to some perjury, but certainly not to so much as words alone.] Here there were conversations both before and after the payment of interest, which coupled such payment with the debt of £00l. It is not necessary, however, to contend that there was a payment of interest in this case sufficient to take it out of the statute of limitations; the question is, whether there was not evidence from which such payment might be inferred, and of that there can be no doubt.

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*Bompas* Serjt. and *Ball*, contra. To the statute of the 9 Geo. 4. c. 14. is spoken of by the other side as if it were a technical rule of which the court should get rid, but it is a most beneficial act, and ought not to be broken in upon, particularly by such unsatisfactory evidence as was given in this case. The 200l. may have been no part of the present demand. The promissory notes were never mentioned in the conversations sworn to by the witnesses, and no interest appears to have been indicated upon them. It is not sufficient to say that there is a probability that the 200l. consisted of the first three notes set out in the declaration; it must be proved that such was the fact. [*Parke B.* Can you say that the case can be put otherwise, than that there was a part payment of interest upon a sum of 200l. and that such 200l. is formed of the first three notes in the declaration? The amount of the two notes for 40l. cannot be added to any of those notes so as to make 200l.] Showing a debt to exist is not evidence that a payment has been made on account of that debt; neither is it enough to assume that there is no other debt between the parties, and therefore the payment must have been in respect of such debt; *Holme v. Green* (a). A mere payment of money is nothing, you must show that it was made on account of the demand for which you sue; *Tippett v. Heane* (b). But this can only be proved by what took place at the time; a transaction coupled with verbal declarations must be perfect in itself, and you cannot connect it either with prior or subsequent conversations. [*Parke B.* You mean to say that parol declarations must accompany the act, and declarations made at any other time are not admissible.] The object of the 9 Geo. 4. c. 14. would be completely defeated if parties were at liberty to give evidence of declarations made

(a) 1 Stark. N. P. 408.

(b) 4 Tyr. R. 774.

at any distance of time, so as to connect a payment with some particular debt; for the act intended that a verbal acknowledgment should be dispensed with only where the payment was a perfect payment when it was made. It has been decided upon this act, that a verbal acknowledgment of the payment of part of a debt is not sufficient to take the case out of the statute of limitations; *Wells v. Newham* (a); and to let in evidence to prove to what debt a payment relates, would, according to the opinion of Lord Ellenborough in *Holbe v. Gledhill*, be attended with mischievous consequences. Allowing, however, that the evidence adduced at the trial was admissible, no certain conclusion can be drawn from it, for it does not establish that the payments were of interest, neither, if they were, does it sufficiently connect such payments with the debt; *Parke v. Davis* (b).

*Cur. adv. vult.*

PARKE B. now delivered the judgment of the Court. In this case, which was tried before my brother Gurney, and was argued before my brothers Bolland, Alderson, Gurney, and myself, a few days ago, on showing cause against a rule for a new trial, the question was, whether there was sufficient evidence to go to the jury, to take the case out of the statute of limitations. The action was brought to recover the amount of five promissory notes from the defendant to the testator, due more than six years before the commencement of the suit; one for 100*l.*, two for 50*l.*, and two for 20*l.* each. The evidence of a promise within six years was, that the defendant, on an application to him, said that his wife would have called on the testator, and paid him money on account of the interest on 200*l.*; but she had not called in consequence of the illness of his child; that in about a fortnight afterwards

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(a) 3 Y. & J. 518.

(b) 6 Bing. 349.

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the wife called and paid 15s. without saying on what account; on another occasion the defendant sent word to the testator, that his wife was in *Wales*, or she would have called with the interest; and that the wife on other occasions made payments to the testator, who said at the time he should be glad if the interest was more regularly paid. This evidence was left to the jury, and the plaintiffs recovered a verdict.

We are of opinion that the evidence was sufficient to warrant the verdict. The objections to it were two:

First. That the payments made to the testator, were not sufficiently proved to be payments of interest.

Secondly, That there was no proof that they were payments of interest, on the notes for which the action was brought or any of them.

The first of these points depends upon the construction of the 9 Geo. 4. c. 14. s. 1., by which, after referring to the *English* and *Irish* statutes of limitation, it is enacted "That in actions of debt or upon the case, or grounded upon any simple contracts, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any

payment of any principal or interest made by any person whatsoever." On the first perusal of this clause, it would seem that the proviso takes the case of part-payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore, that these facts would not only have the same effect, but might be proved exactly in the same way, that they would have been, if the act had not passed; and consequently by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgments of the debt itself. But the Court of Exchequer in the case of *Willis v. Newham* (a) decided that the verbal acknowledgment of part-payment of a debt, was insufficient, and they construed the act as containing a general provision that in no case should an acknowledgment or promise by words *only*, be sufficient to take the case out of the statute of limitations; whether such acknowledgments were of the existence of the debt, or of the fact of part-payment; and they considered the proviso as *leaving* to the fact of part-payment *if properly proved*, that is, not by an acknowledgment *only*, the same effect which it had before the statute. And this construction of the act certainly extends the remedy, and obviates the mischief to be guarded against in a greater degree than the words taken in the ordinary sense would do. But if part-payment, or payment of interest, is proved in any legal mode, and not by admission *only*, this case is no authority that such proof is not sufficient. The act of 9 Geo. 4, as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect; save that it requires something *more* than mere admission. The meaning of part-payment of the principal, is not the naked fact of payment of a sum

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(a) 3 Y. & J. 518; see 4 Tyr. R. 177, 960.

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of money, but of payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the act, is that it is not a *mere* acknowledgment by *words*; but it is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by a mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party making it, at the time: such appropriation may be shown by any medium of proof, and many instances might be put, of full and cogent proof of such appropriation, where nothing was said at the time by the debtor; as for example, if the day before, the debtor had called and informed the creditor, that he would the day after send his clerk with a specific sum on account of the larger debt, then described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum, and took the creditor's receipt, expressly stating the account on which it was received, and delivered it to his employer; there could be no doubt that such evidence would not only be admissible, but if distinctly proved, at least as satisfactory, as a declaration accompanying the act of payment. In the present case, there is evidence *to the same effect*, though by no means so cogent, as in the instance put, but still sufficient for the consideration of the jury. There is evidence which is in effect this, that the defendant, before the payment, said that his wife was his agent, to pay interest on a debt of 200*l.*, by his authority. There is a statement that she had been prevented calling before by a temporary cause, which amounts to a



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representation that she would soon call and pay such interest; she did call soon after and paid a sum of money; and on other occasions she paid sums, which the testator in her presence in effect treated as *interest*, and she acquiesced. This evidence has been properly submitted to the jury; and they have been satisfied with it. If they had not, we should by no means have disapproved of their verdict—but on the other hand we cannot say that it is wrong. The other objection is, that the payment of interest is not sufficiently connected with the debt on which the action was brought. We agree that there must be reasonable evidence of the identity of the debt, on which the interest is paid, with that sued for; but we are clearly of opinion, that there was sufficient in this case. There is the defendant's statement that interest was to be paid, and on a debt of 200*l.* bearing *interest*, and the two notes for 50*l.* and the one for 100*l.*, on which the action is brought, agree with that description; and there is no proof or suggestion of any other transaction between the parties, to which such a description will apply, for it is clearly inapplicable to the other claim of 40*l.* on two notes. The case by no means resembles *Holme v. Green (a)*, in which the only proof was the simple payment of a sum of money by *one of two* debtors, without any proof whatever of its being paid on account of any debt due from both; still less of its having been paid on account of a greater debt, so as to amount to an acknowledgment or promise, to pay that greater debt.

We therefore think that the rule must be discharged.

Rule discharged.

(a) 1 Stark. C. N. P. 488.

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GOODRICKE, Baronet, and Another, Assignees of the Sheriff of STAFFORDSHIRE, *against* TURLEY and Others.

A party who has obtained a rule nisi on an affidavit which is defective on account of the jurat not stating the names of the deponents, cannot, on cause being shown, support his rule by a fresh affidavit; but the court will enlarge the rule in order to allow time for a fresh affidavit to be filed.

**ARCHBOLD** had obtained a rule to show cause why, on payment of costs, all proceedings on the bail-bond assigned in this action should not be stayed special bail having been put in and justified.

*J. Jervis* now showed cause, and took a preliminary objection to the affidavit on which the rule had been granted, and which was defective, the names of the three deponents by whom it was made not being stated in the jurat.

*Archbold* produced another affidavit, and contended that he had a right to use it, on the authority of *Salloway v. Whorewood* (a), where it was held, that fresh affidavits may be read on showing cause, where they tend to confirm what was sworn at the time the rule was granted, and do not contain new matter.

*Jervis* objected that a subsequent rule in the action had been obtained on the affidavit now produced (b) and that it could not be used in support of the present rule. *Salloway v. Whorewood* does not apply.

**PARKE B.**—The officer says that the defendant should have applied to reswear the affidavit. Though the case cited has not been misapplied, yet it is not according to the modern practice, which is the convenient course. Where a party has obtained a copy of the affidavit on which a rule nisi has been granted

(a) 2 Salk. 461.

(b) See post, p. 149.

and has framed his answer upon such affidavit, it would never do to allow the other side, when supporting the rule, to support their case by fresh affidavits.

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*Archbold* then applied for time to amend the affidavit.

*Jervis* contended, that by the authorities this could not be done. In *Phillips v. Hutchinson* (a), where a rule had been obtained on an affidavit which was irregularly intituled, and where a similar application was made to *Littledale J.* to allow the party to amend, that learned judge is reported to have said, "With respect to the question of amendment, it appears to me that the title cannot be amended. How can you have an affidavit, dated one day in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then it is said the rule may be enlarged. There also the same objection will arise, because then it must be the original rule which is discharged or made absolute."

PARKE B.—I see no reason why this rule should not be enlarged, and the defendants be at liberty to file a fresh affidavit. There will be no inconsistency in allowing that to be done.

ALDERSON, BOLLAND, and GURNEY Bs. concurred.

Rule enlarged accordingly, on payment  
of costs (b).

(a) 3 Dowl. P. C. 20.

(b) See *Anon.* 2 Chitty's Rep. 20; *Ex parte Smith*, 2 Dowl. P. C. 607.

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BATE *against* BOTTEN.

A defendant having entered an irregular appearance, instead of amending it entered a new appearance, of which he gave notice to the plaintiff, and demanded a declaration, and afterwards signed judgment of *non-pros* on account of the plaintiff not declaring in due time. The court set aside the *non-pros*, holding, that the defendant should have applied to amend his original appearance.

**PLATT** had obtained a rule to show cause why a second judgment of *non-pros*, signed by the defendant in this cause, should not be set aside with costs, for irregularity. The writ of summons had been served in *November* 1834. The defendant entered an appearance in due time, which was defective, the plaintiff's surname having been omitted. On the 30th *January* 1835, he entered a new appearance, and, without giving the plaintiff notice of such new appearance, demanded a declaration. The plaintiff not having declared within the next term, the defendant signed judgment of *non-pros*, which was set aside by the court in the following *Trinity* term for irregularity. The defendant conceiving that such judgment had been set aside from want of notice to the plaintiff of the appearance entered in *January*, proceeded to give him notice thereof, and again demanded a declaration. The plaintiff not having declared in due time, the defendant once more signed judgment of *non-pros*, and gave notice to tax his costs.

Sir *W. W. Follett* now showed cause, and contended, that inasmuch as the former judgment of *non-pros* had only been set aside on account of the plaintiff not having had notice of the second appearance, that the present judgment was perfectly regular, due notice having been given of such appearance pursuant to the provisions of the 2 *W. 4. c. 39. s. 2.*

*Platt* contra. The defendant ought to have amended the old appearance, and had no right to enter a new one, which was a nullity, and could not be made good by the notice.

PARKE B.—I apprehend that the proper course for the defendant would have been to apply to amend the old appearance. The officer certifies such to be the practice, and therefore this judgment must be set aside.

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*Per Curiam.*—(Lord ABINGER C. B., PARKE, ALDERSON, and GURNEY Bs.)

Rule absolute.

GOODRICKE, Baronet, and Another, Assignees of the Sheriff of STAFFORDSHIRE, *against* TURLEY and Others.

**ARCHBOLD** had obtained a rule to show cause why the defendants should not be at liberty to enter a demand of oyer upon the record. The action, which was upon the bail-bond given to the sheriff, had been commenced on the 3d *September*, the appearance was on the 17th, and on the 24th *October* the declaration was delivered, with notice to plead in eight days. On the 3d *November* the defendants obtained eight days' further time to plead, under a judge's order, on the usual terms of pleading issuably and taking short notice of trial, and on the 9th, two days' further time was granted under a second order. On the 10th they demanded oyer of the bail-bond, and on the 11th pleaded that the sheriff did not assign the bond. Issue was joined on the 12th, and notice of trial given for the 20th. On the 13th special bail was put in, and on the same day a rule was obtained to stay proceedings upon the bail-bond, against which cause was waived their right to demand oyer of it; and secondly, that such right was not waived by obtaining time to plead; and the court ordered that the plaintiffs should grant oyer of the bond, and that the defendants should have as much time after oyer to plead to it as they had unexpired when the demand of oyer was made.

In an action on a bail-bond, the defendants had obtained time to plead, under two several judges' orders, until the 11th *November*, upon the usual terms of pleading issuably and taking short notice of trial. On the 10th they demanded oyer of the bond, and on the 11th pleaded that the sheriff did not assign it: Held, first, that by pleading a plea beside the bond, they had not

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afterwards shown, when a preliminary objection being taken to the affidavit on which such rule was granted, the court enlarged the rule in order to give time for a fresh affidavit to be filed (*a*).

*J. Jervis* now showed caused against the present rule. Oyer ought to be demanded before the time for pleading has expired; but here no demand was made until after two judges' orders had been obtained, allowing further time to plead. The defendants, on those applications, should have asked for time to demand oyer, and have made it a condition in the judges' orders; for by obtaining time to plead, and agreeing to plead issuably and to take short notice of trial, they are precluded from demanding it now. In *Far-  
rance v. Brignall* (*b*), there was a summons both for oyer and time to plead, which shows it must have been considered that by obtaining the latter alone, the former would be excluded. [*Parke B.* There is no necessity to have a summons for oyer; it is a right at common law.] There are no cases stating directly whether a party is in a condition to demand oyer after having got further time to plead, although *Best*, Serjt. in argument in *Sparkes v. Simpson* (*c*), says that the rule is, he may; but the authorities collected in the old books of practice lay it down, that the demand must be before the time for pleading has expired (*d*). [*Parke B.* The defendants are bound by the judge's order to plead in a certain time; but if they can afterwards demand oyer, they may extend the time. Your argument is, that by obtaining further time to plead, they have waived their right to oyer, as after the grant of oyer they have, according to the cases, as much time to


(*a*) See *ante*, 146.

(*b*) *Barnes*, 241.

(*c*) 2 *Bos. & Pul.* 379.

(*d*) *Prac. Reg.* 278; *Barnes*, 241, 268, 329; *Gerard v. Early*, 2 *Wils.* 13.

plead as when they first demanded it.] The parties have also, by pleading, waived their right to demand oyer.

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*Archbold* contra. The arguments on the other side are no answer to this application; if they are entitled to weight they will form ground for a counter plea to the demand of oyer. The defendants have not waived their right to oyer by obtaining further time to plead; but even were that so, they would still be entitled to have a demand of oyer entered on the record. [*Parke* B. You have only a right to have a demand of oyer entered on the record, supposing it to have been properly demanded.] Here there has been no demand of a plea, and the defendants have twenty-four hours afterwards to make a demand of oyer. [*Parke* B. There was no occasion to demand a plea, for you have bound yourselves by the judges to plead in a limited time (a).] The objection that the right to oyer is waived by the defendants pleading, would have been well founded if the plea had been to the bond, for parties cannot plead to a bond without demanding oyer; but here the plea only goes to the assignment by the sheriff, and the defendants are still at liberty to plead to the bond when oyer is granted. The judge's order implies that the defendants may afterwards demand oyer, because they cannot plead issuably, which they thereby agree to do, without making a demand of oyer; and the other side, by refusing oyer, will not allow them to plead according to the terms of the order. [*Alderson* B. You say that pleading issuably refers to the nature of the plea, and not to the time when it is to be pleaded. *Parke* B. Suppose you have obtained six days' time to plead, and after the expiration of four

(a) See *Rose v. Christfield*, 1 T. R. 591; *Wilkinson v. Brown*, 6 T. R. 524.

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days you demand oyer, when are you to plead? Do you say you can extend your time to plead by demanding oyer?] If oyer is granted when demanded, the defendants are bound to plead within the period prescribed by the judge's order, but if a delay takes place in granting it, they have as many days to plead afterwards as they had unexpired at the time they demanded it (a). [*Parke B.* The difficulty in the case arises from the defendants having obtained a judge's order for further time to plead; and the question is, whether by taking it they are not precluded from afterwards demanding oyer.] The judge's order leaves the case precisely in the same state as before, except as to time, and it is the fault of the plaintiff if any delay in granting oyer occurs. [*Bolland B.* In *Sparkes v. Simpson*, the court seems to have taken your view.]

PARKE B. (After consulting with *Alderson, Bolland, and Gurney Bs.*)—The court are of opinion that the defendants have not waived their right to demand oyer by pleading a plea which is beside the bond; it might have been otherwise if they had pleaded to the bond. The question then is, whether they had a right to a demand of oyer at the time when it was made, and that depends upon whether they waived their right by going before a judge and obtaining time to plead. There is an inconvenience whichever way the point is decided. It is inconvenient to allow a party to claim oyer after a limited time has been granted to him in which he is to plead. On the other hand, if a defendant is bound to demand oyer before he obtains further time to plead, an attorney, without instructions from his client as to the nature of the defence, will be driven to demand it, though it may turn out afterwards that he has incurred an unnecessary expense; and the latter seems the greater inconveni-

(b) See *Webber v. Austin*, 8 T. R. 356.



ence. The officers of the court state, that unless there is some exception in the rule granting further time to plead, that a defendant may afterwards demand oyer, and it is laid down to that extent in the books of practice, and, among others, in Mr. *Archbold's* work, but the authorities there cited do not bear out the position. In order that our practice may be uniform with that of the other courts, we have sent to request information from the officers of the King's Bench and the Common Pleas as to their practice. If it should agree with that which the officers of this court says prevails here, we will adhere to it; but if not we will take time to consider of our determination.

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PARKE B. afterwards said, the officers of the King's Bench are not aware of any practice upon the point, and that of the Common Pleas accords with the practice here. We therefore think that the defendant was in time when he demanded oyer, and he must now have liberty to demand it, and be allowed the same time to plead after it is granted, that he had when he first made the demand.

Rule absolute accordingly, neither party paying costs subsequent to the refusal of oyer, as it was a matter of doubt.

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TABRAM *against* WARREN.

ASSUMPSIT on an attorney's bill, for money lent, and on an account stated. Plea, never indebted. An action by an attorney for his charges incurred in selling or mortgaging the property of a party confined in prison for debt, after such party has petitioned the insolvent court for his discharge, cannot be resisted on the ground that such sale or mortgage was fraudulent as against the creditors of the insolvent. The only ground, it would seem, on which such an action can be defended is, that the insolvent could derive no benefit from the plaintiff's skill.

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At the trial before the under-sheriff of *Cambridgeshire*, under a writ of trial, it appeared that in the month of *February* 1835, the defendant was a prisoner for debt in *Cambridge Castle*, and was about to take the benefit of the insolvent act. While so confined he wished to sell some land of which he was possessed; and for that purpose he employed the plaintiff to offer it to certain parties, who refused to purchase on hearing that the defendant had petitioned the Insolvent Court for his discharge. It was afterwards agreed that the defendant should grant a mortgage for 23*l.* upon the property to a Mr. *Lawrence*, who was an attorney of the Insolvent Court, and such mortgage was accordingly prepared by the plaintiff and executed by the defendant. The deed, which bore date the 20th *February*, was stated to be made in consideration of a debt of 5*l.* 5*s.* owing from the defendant to the plaintiff, and which was to be paid to him by *Lawrence*; and also in consideration that *Lawrence* should prepare and file the necessary papers, and procure the defendant's discharge under the insolvent act, the expense of which was estimated at 12*l.*; and further on consideration of 5*l.* 15*s.* to be advanced by *Lawrence* to the defendant for necessaries during his imprisonment, amounting altogether to the said sum of 23*l.* At the hearing of the insolvent's petition, the commissioner required the mortgage to be delivered up and cancelled; which was done, and the defendant was declared entitled to the benefit of the act. The sum claimed by the plaintiff, under his particulars of demand, was 12*l.* 19*s.* 6*d.*, whereof 7*l.* 19*s.* 6*d.* was for his charges as an attorney, and 5*l.* for money lent. At the trial the plaintiff proved his retainer and employment by the defendant to sell his land and the preparation of the mortgage deed, and also gave some slight evidence to support his claim for money lent.

The under-sheriff having nonsuited the plaintiff, *Biggs Andrews*, on a former day, obtained a rule to show cause why the nonsuit should not be set aside and a new trial had.

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*Kelly* now showed cause accordingly. The charges in the plaintiff's bill of particulars related entirely to the attempt of the defendant to sell or mortgage his property; and such an attempt on the part of a man who was about to take the benefit of the insolvent act was an endeavour to effect a fraud upon his creditors. [Lord *Abinger* C. B. Had the defendant petitioned the Insolvent Court previous to the time when the charges in the plaintiff's bill were incurred?] Yes. The plaintiff as an attorney must have been aware that the transaction was fraudulent, and he cannot recover the amount of his bill for business done under such circumstances.

*Biggs Andrews* contra. The only plea was, that the defendant never was indebted. The sole question therefore for the jury was, whether he was so indebted, and whether or not the sale or mortgage, in respect of which the plaintiff's charges were incurred, might be afterwards set aside, was perfectly immaterial. The mortgage to *Lawrence* was binding upon the defendant, even if it were not so as against his creditors. There is nothing to prevent a man who is in gaol, and about to take the benefit of the insolvent act, from selling his estate, whereby he may, perhaps, hope to pay his debts. Admitting that his creditors may subsequently avoid the sale, yet they may possibly agree to accept the purchase-money, thinking that the property has been advantageously sold. If the party should in the meantime squander the money, the Commissioners of the Insolvent Court have it in their

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power to punish him. [*Parke* B. The only ground on which the action can be defended as to this part of the case is, that the defendant could derive no benefit from the plaintiff's skill.] With respect to the plaintiff's claim for money lent, it is quite clear that the nonsuit was wrong, as there was some evidence that the plaintiff had lent the defendant the sum of 5*l*.

Lord ABINGER C.B.—You have said enough to show that the cause should have gone to the jury.

PARKE, ALDERSON, and GURNEY Bbs. concurred.

Rule absolute

### NICHOLLS *against* BASTARD.


Trover may be maintained by a gratuitous bailor of cattle against a wrong-doer who takes them out of the possession of the bailee.

Trover for cattle, goods, and chattels. Plea, as to all the cattle &c. mentioned in

the declaration, that one *H.* had fraudulently sold them to the plaintiff. Replied, that *H.* had not fraudulently sold them to the plaintiff; on which issue joined. The plaintiff in his particulars limited his claim to one cow. The jury found that *H.* had made a fraudulent sale of his effects; but that the cow was property of the plaintiff, and was not sold by *H.*:—Held, that the verdict should have been entered for the plaintiff.

**T**ROVER for horses, mares, bulls, cows, &c. Plea first, not guilty; secondly, that the cattle, goods, and chattels mentioned in the declaration were not the property of the plaintiff; and, thirdly, that one *Horn* was possessed of the said cattle, goods, and chattels and in order to prevent them being taken under expected execution, fraudulently sold them to the plaintiff; that a writ of execution being delivered to the defendant, who was the sheriff of the county of *Devon*, against the goods of *Horn*, he seized the said

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cattle, goods, and chattels for the levy under such execution. Replication to the third plea, that *Horn* did not, in order to prevent the said cattle, goods, and chattels from being taken in execution, fraudulently sell them to the plaintiff; on which issue was joined. The plaintiff in his bills of particulars limited his claim to one cow. At the trial before *Gurney* B. at the last *Deconshire* assizes, it was proved, on the part of the plaintiff, that he was possessed of a cow, and had lent it to the defendant to be kept in the latter's pasture, where it was taken by the defendant. For the defendant evidence was given that *Horn* had sold a great deal of property, in order to avoid the execution, part whereof was purchased by the plaintiff; and that *Horn* had no cow on his premises, except the one in question, which was put into the catalogue of sale, although it was not sold. The defendant's counsel objected that the plaintiff, supposing the cow to be his, could not maintain trover for it, as it was not in his possession at the time it was taken. The learned baron overruled the objection, and left the case to the jury upon the evidence, who returned their verdict for the plaintiff on the issue of not guilty. They also found that the cow was the plaintiff's property, and that it had not been sold by *Horn*, but that the sale made by the latter of his effects was fraudulent. The learned baron, upon this finding, directed a verdict to be entered for the plaintiff upon the second issue, and for the defendant upon the third, giving the plaintiff leave to move to enter a verdict upon that issue also, if the court should think him entitled.

*Fraser* having moved accordingly, *Erle* for the defendant, on the same day, made a cross-motion for a new trial, upon the issue raised by the second plea. He submitted that the plaintiff could not maintain trover for the cow in question, for, according to

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the authorities, he must have the right of possession as well as the right of property at the time of conversion; *Godson v. Harper* (a), and *Pain v. Whitaker* (b). In *Roberts v. Wyatt* (c) it was held, that a party entitled to the temporary possession of a chattel, and who had delivered it back to the owner for an especial purpose, might, after such purpose was satisfied, maintain trover for it against the owner. Here the plaintiff had parted with the possession of the cow at the time it was taken by the sheriff, as he had lent it to *Horn* to be kept by the latter, by whom, or in whose name, the action should have been brought.

PARKE B.—The old authorities show that either the bailor or bailee may maintain the action. It is laid down in *2 Roll's Abridgment*, 569 (P.) pl. 5., that if both the bailor and the bailee shall bring trespass, whichever shall first recover shall oust the other of his action (d); and in this respect there is no distinction between trespass and trover (e). In two of the cases which have been cited, the bailor had parted with his interest in the goods for a certain time for hire, whereas this was a gratuitous bailment (f). *Roberts v. Wyatt* is also distinguishable on the same ground.

*Per Curiam.*

Rule refused.

*Erle* and *Rowe* now showed cause against the rule obtained by *Fraser*. The issue on the third plea was found for the defendant at the trial, and he is entitled to keep the verdict then entered for him. The plea goes to the whole declaration, and justifies the taking

(a) 7 T. R. 9. (b) 1 Ryan & M. 99. (c) 2 Taunt. 268.

(d) See also Bro. Tresp. 67; *Flewelin v. Rave*, 1 Bulstrode, 69.

(e) See 3 Bac. Abr. Trover (C), 805; 2 Saund. 47 e.

(f) See *Loten v. Cross*, 2 Camp. 464.

of all the cattle therein mentioned, and the allegations in the replication follow those of the plea, and are applied to the same subject-matter. The plaintiff by his replication admits that cattle were sold, but denies the sale was fraudulent. The jury have found it was, and consequently the issue raised upon the plea has been decided for the defendant.

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*Fraser* contra was not called upon.

PARKE B.—The effect of the bill of particulars being to strike out of the declaration every article except the cow, it was incumbent upon the defendant, under the issue raised by the third plea, to prove that such cow was the property of *Horn*, and that he fraudulently sold it to the plaintiff. This he failed to do, and therefore the verdict upon that issue must be entered for the plaintiff. The defendant is entitled to have a verdict entered for him, as to all the articles comprised in the declaration, except the cow, but it would be of little benefit to him.

ALDERSON B.—It is assumed, that an admission made for the purposes of pleading is an admission of the truth of the facts stated. The replication in the present case does nothing more than avoid a contest with respect to the sale by *Horn* of his goods, and the real issue raised was, whether he fraudulently sold this cow; and how could he do so when he never sold it at all?

GURNEY B. concurred.

Rule absolute.

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*AGAR against BLETHYN and Another.*

A married woman, living apart from her husband in adultery, acquired moneys, which she deposited with bankers. She then married again, her first husband being still alive, and on such marriage settled the money so deposited for the benefit of herself and second husband and two illegitimate children.

Shortly afterwards she was convicted of murder, and executed.

Previous to her trial, she and her trustees applied to the bankers

for the fund, in order to employ it in her defence, which the trustees conducted in an extravagant manner, but the bankers refused to pay it over. After her execution, the trustees and the first husband severally brought actions against the bankers to recover the money, which were stayed under an interpleader rule, and an issue was directed to try the question between the first husband and the trustees, under which a verdict was found for the first husband:—Held, on an application for a new trial, that he was entitled to the money.

Held, secondly, on showing cause against a rule for paying over the money to the plaintiff, that the bankers should be allowed their costs out of the fund, which were to be retained by them on paying it over to the plaintiff.

Thirdly, that the trustees, not having acted *bona fide*, should repay the costs of the bankers to the plaintiff, and also pay all the costs incurred by him in the course of the proceedings.

*Semble*, that if the trustees had acted *bona fide*, they would not only not have been charged with such costs, but possibly might have been allowed their own costs out of the fund.

**T**HIS was a feigned issue to try whether the plaintiff was entitled to two sums of 400*l.* and 100*l.* either of them. The following were the facts of the case:—At the last *Bristol* spring assizes, a woman then known by the name of *Mary Burdock*, was convicted of the murder, by poison, of a Mrs. *Clara A. Smith*, and was executed. On the 30th *January* 18— she had paid into *Stuckey's* bank at *Bristol*, a sum 400*l.* in her maiden name of *Mary Williams*, and in the following *May* another sum of 100*l.* in the name of *Mary Agar*. In that month she married one *Paul Burdock*, and, in contemplation of such marriage, a settlement, dated the 17th *May*, was made between *Paul Burdock* of the first part, herself, described as *Mary Agar*, widow, of the second part, and the defendants of the third part, whereby she assigned, together with her stock in trade, the two sums paid into *Stuckey's* bank, to the defendants, upon certain trusts for herself and *Burdock*, and for her two illegitimate children. On the 20th she requested the banking company to transfer the money into the names of the



trustees, which was done. Some time previous to the trial, the trustees applied to the bankers, first by presenting her cheque, and then their own, for the money, which the bankers refused to pay over, having received notice from the representatives of Mrs. Smith, that they claimed it as part of her property. After *Mary Burdock's* execution, the trustees made another application to the banking company for the 500*l.*, which was also refused. On the 5th *May* 1835, the trustees commenced an action against *John Manningford*, one of the public officers of the banking company appointed under the 7 *Geo.* 4. c. 46., for the recovery of the money; and on the 17th *May* an action was likewise instituted against *Manningford* by the plaintiff, who claimed the money as the lawful husband of *Mary Burdock*. *Manningford* having applied to the court under the interpleader act, 1 & 2 *W.* 4. c. 58., an order was made by Mr. Baron *Parke* to stay the proceedings in both actions, directing the money to remain in the bankers' hands, and an issue to be tried at the next *Bristol* assizes between the plaintiff and the defendants, in which the question was to be, whether the plaintiff was entitled to the two sums of 400*l.* and 100*l.* or either of them. The issue was accordingly tried before *Gurney* B. at the last *Bristol* assizes, when it was proved that the plaintiff was married to *Mary Burdock*, then *Mary Williams*, on the 3d *May* 1819, and that after living with her a few months he had left her, and during his absence she gave birth to an illegitimate child. It appeared that he afterwards returned and found her residing with another man, and that again quitting *Bristol* he went to *London*, where he remained for upwards of twelve years, following his business of a hat-maker. During that period she had lived with different persons, and bore another child; and for some time before her marriage with *Burdock* had kept a shop, carrying on trade

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on her own account. After her apprehension the trustees sold her stock in trade included in the settlement and received the money, and employed an attorney named *Peters* to defend her on her trial, whose bill amounted to upwards of 400*l*. The learned judge, in summing up, told the jury, that if they were satisfied with the proof of the plaintiff's identity, and of his marriage with the woman, he was clearly entitled to the two sums claimed. The jury having found a verdict for the plaintiff,

*Merewether* Serjt. moved for a new trial, on the ground of misdirection. He contended, that though the general rule of law was, that a husband was entitled to the personalty of his wife, yet the present case formed an exception. The law, on giving the wife's personal property to the husband, casts on him the burthen of maintaining her, and makes him liable for her debts. When, however, a woman commits adultery, the husband is no longer bound to support her; and where the obligation to provide for her future maintenance is put an end to, the right to any property she may subsequently acquire ought also to determine. Here the wife was living apart from her husband with other men, and the plaintiff ceased to be liable for the debts she might contract, consequently she herself became liable to them, otherwise she could not procure the necessaries of life; and such liability on her part carried with it the privilege of acquiring and holding property to enable her to discharge her engagements. [*Alderson* B. Is there any case to show that an action may be maintained against a married woman under circumstances like the present?] In *Cox v. Kitchen* (a) the court expressed an opinion to that effect. It was there said by *Buller* J. that the

(a) 1 Bos. & Pul. 338.

wife "can obtain no credit unless she be liable for her debt." [*Alderson* B. It would be a strange thing if crime should produce privilege. I do not see any hardship in an adulteress not being able to procure credit.] Here the wife had lived for years as a feme sole, had carried on trade upon her own account, and she had a right to dispose of the property so accumulated, and to make it over to the trustees. It will be an extraordinary thing if the husband, who has taken no part in acquiring the money, can, after the wife has assigned it, come forward and claim it as his.

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LORD ABINGER C. B.—There is no foundation for the assumption, that a married woman living in open adultery possesses the same powers of disposition of property, as a married woman having a separate estate.

The other Barons concurred.

#### Rule for a new trial refused.

The plaintiff having obtained a rule nisi for the payment of the money to him, *Merewether* then made a cross motion to stay it in the bankers' hands till Mr. *Peters'* bill of costs should be taxed, and the bill of costs of the defendants, if any, taxed, and the amount thereof respectively paid out of the fund. He contended that the husband was liable for the expenses which had been incurred in defending the wife.

*Per Curiam*.—If that be so, the attorney can proceed against the husband. With respect to the fund, if the trustees acting in the execution of the trusts had applied any portion of it for the defence of the wife before they received notice of the husband's claim, they might then have been entitled to retain, or

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to be exonerated from any demand by him of such part. But here all that could be so appropriated was the interest of the wife and second husband during their lives, for the principal money was settled for the benefit of the woman's children, and could not be taken for such a purpose.

Rule refused.

The rule obtained on the part of the plaintiff called upon the defendants and *Manningford* to show cause why the sums of 400*l.* and 100*l.* should not be paid to him, and why the defendants should not pay the plaintiff the costs of his appearance on the application of *Manningford*, and the costs of this cause, and also the costs of the action brought by the plaintiff against *Manningford*, and of that application.

*Ludlow* Serjt. on a subsequent day appeared for the banking company, who were ready to pay over the money as the court should direct, but who claimed to be allowed their costs out of the fund. He submitted that they would have been entitled to their costs under a bill of interpleader. In *Cotter v. Bank of England* (a) the Court of Common Pleas adopted the practice of the courts of equity, and granted the stakeholder his expenses. [*Alderson* B. In that case the Court of Common Pleas inquired and ascertained that the practice of the courts of equity was to allow parties their costs out of the fund.] In *Duear v. Macintosh* (b) and *Parker v. Linnett* (c) the same rule was observed.

*Merewether* Serjt. showed cause for the defendants. It was proved at the trial that the plaintiff was absent from *Bristol* for fourteen years, that his wife went by another name, and that all parties dealt with her as a

(a) 3 Mo. & Sc. 182.

(b) Ibid.

(c) 2 Dowl. P. C. 562.

*feme sole*. There was a good deal of evidence given as to the identity of the plaintiff; previous to which there was no certain knowledge upon the point. [Lord *Abinger* C. B. This question was decided at the trial.] Yes, at law; but the court sits here in equity under the interpleader act. The trustees employed an attorney to prepare the settlement, and had the wife really been *feme sole* at the time she was so carrying on trade, they would have had an expectation of obtaining their expenses. It is not reasonable that the husband should take away money from them that never was his property. [Lord *Abinger* C. B. Do you say that we can alter the law, which gives it to the husband? *Alderson* B. As between the contending parties it is a question of law; but as between them and the stakeholder it is a question of equity. But it appears to me that you do not distinguish between a fund in the hands of the trustees, and one in those of other parties. The trustees must first get the money into their possession before you can set up any equity on their part.] The bankers held the money by their direction. They defended the wife when under a charge affecting her life. She gave them orders to do so, and otherwise she would have been undefended. The husband, if he afterwards comes and takes the fund, must take it subject to the equities charged upon it by the wife. [Lord *Abinger* C. B. The utmost you can claim will be to the extent of the wife's life interest under the second settlement. Did the second husband consent to the application of the money?] He makes no affidavit. Supposing the money to be the husband's, and that the wife was in possession of it, the question is, whether the court will not presume she was his agent for the purpose of applying it for her defence. She clearly would have been so in paying for necessities. Again, suppose she had been in the habit of receiving the

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rents of the husband's property for a number of years, without accounting to him, would not the court assume she had the disposition of them for her own subsistence? [*Parke* B. If the trustees could have shown that they applied any part of the money in accordance with the trusts of the deed, without notice of the husband's claim, and on the faith that the wife was entitled to it, they would have been protected. *Alderson* B. That question was settled upon the motion for a new trial. The question now is, who has been in fault; and it seems to me that you should not have disputed the husband's right, but have only claimed a lien.]

*Erle* in support of the rule. In *Cotter v. Bank of England* the stakeholder had a lien. If the plaintiff had applied for the fund, and the bankers had refused to pay it because some man of straw had made an unfounded claim to it, they would not have been justified in refusing, and then coming to the court for protection under the interpleader act. Here the bankers are not entitled to their costs out of the fund, inasmuch as they listened to a claim made by parties who, in urging it, were guilty of a breach of trust. The authority given to the court as to costs, by the act, ought to be well considered. [*Alderson* B. Was not the power given to us by the act, that we might exercise our discretion; and can we do better than adopt the practice of the courts of equity as to costs? In *Aldridge v. Mesner* (a), a defendant who had made a bill of interpleader necessary, was ordered to pay all the costs, and the plaintiff was declared to have a lien for his costs upon the fund.] The costs ought to be against the party, and not charged upon the fund. Supposing a horse to be the thing in dispute, and the party in

(a) 6 Vea. 418.

whose possession it is comes to the court under the act, the court cannot order the horse to be taken from the rightful owner, and sold for the costs of the party in possession. [*Alderson* B. Why should he not have a lien on the horse for his costs?] Here one of the defendants sent a constable from *Bristol*, who traced out the husband in a few hours after he reached *London*. [Lord *Abinger* C. B. Suppose that the trustees were of opinion that the marriage could be proved, but conceived that the second husband might have said to them, why do you give up the fund voluntarily? There was no doubt as to the second marriage. Suppose that they had parted with the money, and the proof of the first marriage had been lost, and a bill had been filed to enforce the trusts of the settlement?] The trustees sold the woman's stock in trade and other effects for 289*l.*; they got her to sign a cheque for the 500*l.*, and afterwards presented their own cheque to the bankers, and they therefore did not defend her on behalf of the second husband. [*Parke* B. Then you suggest they were not acting *bonâ fide*? *Gurney* B. The impression of my mind at the trial was, that the trustees entered into the trusts contained in the settlement *bonâ fide*. Afterwards I thought they acted *malâ fide*. They got a considerable sum of money into their hands, and it appeared to me that they wished to lay hold of a large fund for the payment of the attorney's bill. They might easily have ascertained that the first husband was alive.]

Lord *ABINGER* C. B.—Looking at the circumstances under which the money was deposited with the bankers, it is by no means clear that the plaintiff would have been successful, if he had proceeded in this action against them, and if so, they are entitled to their costs; and whether these are to be paid out of the

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fund or by the defendant is to them a matter of no consequence. With respect to the trustees, if it had appeared that they had defended the woman *bonâ fide*, the expenses of so doing ought not in fairness to fall on them; but inasmuch as it is the impression of the judge who tried the cause, and as the facts before us seem to disclose, that what they did was not so much to defend her, as to get possession of the money to pay what may be considered as their own charges (a), they ought to pay the costs of the issue and of the whole of these proceedings.

PARKE B.—I am of the same opinion. If the trustees had acted *bonâ fide* in the discharge of the trusts of the settlement, we might then not only not have charged them with costs, but might possibly have allowed them their costs out of the fund.

ALDERSON and GURNEY Bs. concurred.

Rule absolute for *Manningford* to pay over to the plaintiff the two sums of 400*l.* and 100*l.*, retaining thereout his costs to be taxed in and about defending the two actions brought against him by the plaintiff and the defendants, and of this application and appearance thereon, and of the rule, and for the defendants to pay to the plaintiff the amount of such costs so retained by *Manningford*; also the plaintiff's costs of his appearance on the application of *Manningford*, and the costs of this cause, and the costs of the action brought by the plaintiff against *Manningford*, and of this application.

(a) One of the trustees was the partner of Mr. *Peters*, the attorney.



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**T**HE time for putting in bail in this cause expired on the first day of the term. On 4th *November* special bail was put in to avoid an assignment of the bail-bond, and notice of bail was given. On the same day the amount of the debt sworn to was paid into court, with 20*l.* towards costs in lieu of bail; and a common appearance was entered on the 5th. No notice of exception having been given, the defendant gave the plaintiff's attorney notice that the court would be moved on the 7th to enter an exoneretur on the bail-piece filed in the cause, the defendant having paid into court the amount of the debt sworn to, and 20*l.* towards costs in lieu of bail, to abide the event of the action, or the further order of the court; and the defendant having also entered a common appearance, pursuant to stat. 7 & 8 *Geo.* 4. c. 71. On the 9th, *Addison* for the bail, moved before a single baron to enter an exoneretur on the bail-piece (*a*); which being opposed by *Erle*, as the plaintiff's costs of searching after the bail had not been paid, was adjourned for a hearing by the full court (*b*).

An exoneretur will be entered on the bail-piece, under 7 & 8 *G.* 4. c. 71. s. 4., where, after putting in special bail, but before exception, and before the time for perfecting bail had elapsed, the defendant paid into court the amount of the debt sworn to, and 20*l.*, as a security for the costs, under sect. 2. of that act; for he had a right under that section to make that deposit within the time for perfecting special bail in the action, according to the course of the court.

*Addison* for the bail. By sect. 2. of 7 & 8 *Geo.* 4. c. 71., the defendant had a right to pay money into court before the bail above was perfected, though after special bail had been put in, to avoid the assignment of the bail-bond. Costs incurred by the plaintiff in searching after the bail, are costs in the cause only, and ought not to be allowed. As no exception was in

(*a*) Tidd, 9th ed. 288.

(*b*) It is a rule absolute on notice of motion being given, and verified by affidavit; Dax's Practice, 2d ed. 96.

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fact made within the twenty days (a) in consequence of this motion, and no notice of justification was given by the defendant, *non constat* that they would have justified. Even had they attempted to justify in pursuance of a notice for that purpose, and been rejected, no costs would have been payable to the plaintiff, and the same bail might still have rendered the defendant without entering into a fresh recognizance; *Reg. Gen. Hil. 2 Will. 4. No. 20 (b)*. The costs now claimed would in that case have been costs in the cause, and not payable by the defendant, except fresh bail had appeared to justify (c). [*Gurney B.* The bail were not bound to justify, but the assignment of the bail-bond might have been equally prevented by rendering the defendant, as by putting in special bail. *Alderson B.* By putting in bail merely, the task of inquiring after them is imposed on the plaintiff.] The money was paid in within the time for perfecting bail. It is not necessary to read the act as if "perfecting bail" was omitted; for *Straford v. Love (d)* shows, that if a defendant deposits the amount of the debt with the sheriff, with 10*l.* for costs, pursuant to 43 *Geo. 3. c. 46. s. 2.*, he is not bound to pay in the additional 10*l.*, pursuant to 7 & 8 *Geo. 4. c. 71. s. 2.*, until the last day allowed for perfecting bail. That day would depend on the time taken by the plaintiff to except, which he need not do for twenty days. *Rowe v. Softly (e)*, and *Newman and another, assignees, v. Hodgson (f)*, show that the money could not be taken out of court by the plaintiff before the time for perfecting bail had expired.

(a) See *Reg. Gen.* in *Exch. 26 & 27 G. 2*; 1 *Tyr. R. Appendix, p. vi.* *Dax's Practice*, 2d ed. 81.


(b) 2 *Tyr. R. 342.* (c) *Smith v. Cooper*, a prisoner, 1 *Tyr. R. 378.*

(d) 3 *Dowl. P. C. 593.*

(e) 6 *Bingh. 634.*

(f) 2 *B. & Ad. 422*; see 8 *B. & Cr. 496*; 5 *Bing. 269.*

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*Erle contra.* It is sworn, that having discovered the insufficiency of the bail, the plaintiff was ready to except to them. They could not have been changed without leave of a judge (a), who would have then imposed terms. Besides, as bail are only put in and not perfected, the plaintiff is entitled to be indemnified for the costs of inquiries which he was bound to make by that inchoate step of the defendant, though afterwards retracted by him. The bail put in by the defendant are perfect quoad him during the twenty days, subject to defeat by the plaintiff's exception within that time. Now sect. 4. is the only clause giving authority to enter an exoneretur, and applies merely where the court directs that step, as well as after bail is *perfected*. Then the court will indemnify the plaintiff by compelling the defendant to pay these costs.

LORD ABINGER C. B.—The plaintiff applies for his costs of inquiring into the sufficiency of the defendant's bail, without objecting to his depositing money into court in the meantime, instead of perfecting them. Had the latter step been adopted, the costs now sought would not have been received by the plaintiff. Then as the deposit in fact made was more beneficial to him than the perfecting bail would have been, we should not exercise a sound discretion in allowing him these costs.

PARKE B.—The defendant's argument is, that as he deposited money in lieu of bail before any notice of exception was given, he might deposit money under sect. 2. without applying to the court under sect. 4. for leave to do so, as he must have done had bail been put in and perfected. And after adverting to the terms

(a) Reg. Gen. Trin. 1 W. 4. No. 5. [1 Tyr. Appendix, p. vi.] See *Whitland v. Myer*, 3 Tyr. R. 160.

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of section 2., I am of opinion that the defendant had a right to make that deposit at any time before notice of exception given and the time for perfecting bail elapsed. At all events it was open to him to apply to the court to enter an exoneretur under section 4. before receiving notice of exception. Payment of these costs could never have been obtained except it had been made one of the terms of permitting a change of bail.

ALDERSON B.—I agree with my brother *Parke*, that section 2. confers a right on the defendant to pay in money as a deposit, instead of putting in and perfecting special bail within the time allowed for so doing, according to the course of the court. This, however, is an application to our discretion. Now the plaintiff would have no costs had bail above been perfected; and the deposit here made is at least equivalent to such bail, being in fact more beneficial to the plaintiff.

GURNEY B. concurred.

Rule absolute.

### DUCKWORTH and Another *against* FOGG.

Before this court will order execution to issue under 4 & 5 W. 4. c. 62. s. 31. against a defendant on final judgment obtained in the court of Common Pleas at *Lancaster*, an affidavit must be produced (entitled in this court) that he has removed either his person or his goods out of the jurisdiction of the court below.

**TOMLINSON** moved, upon section 31 of the 4 & 5 W. 4. c. 62. the act for improving the practice of the court of Common Pleas at *Lancaster*, for leave to issue a writ of execution upon a judgment recovered in that court against a party who had removed out of its jurisdiction. He produced the certificate from the

the court of Common Pleas at *Lancaster*, an affidavit must be produced (entitled in this court) that he has removed either his person or his goods out of the jurisdiction of the court below.

prothonotary of the court, as to the amount for which final judgment has been signed, but

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*Per Curiam.*—There must be an affidavit that the party against whom the application is made has removed either his person or his goods out of the jurisdiction of the court of *Lancaster*.

Rule refused (a).

The affidavit required was afterwards obtained, but being entitled in the Common Pleas at *Lancaster*, the court refused to suffer it to be used.

(a) See *Lord v. Cross*, 2 Ad. & Ell. 81.

### ANDREWS *against* SMITH.

**ASSUMPSIT.** The first count stated, that whereas one *J. Hill*, now deceased, heretofore, to wit, on 12th June 1833, was retained and employed by one *J. L. Hesse* to do certain work on certain premises, to

A declaration stated that *H.* was employed to do work on certain houses, and that defendant was

employed as surveyor over him, and to receive monies to be paid to *H.* for such work, and that in consideration that the plaintiff would provide and deliver to *H.* such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such monies received by him as should become due to *H.* for the work, if *H.* should give him an order for that purpose. Averment, that *H.* gave such order to the defendant, and required certain materials, which the plaintiff delivered to him, to the value of 1000*l.*, and that that sum became due to *H.* for his work; of all which premises the defendant had notice, and was requested by plaintiff to pay him for the materials out of such monies received by him as were due to *H.* for the work. Breach, that although the defendant had received 1000*l.* to be paid and then due to *H.*, and though the said order had not been revoked, the defendant refused to pay the plaintiff. Plea, that the promise in the declaration was a special promise to answer for the debt of *H.*, and that there was no memorandum or note thereof in writing.

Held, on demurrer, that the defendant's promise was original and not collateral, so as to require to be in writing, under the statute of frauds, 29 Car. 2. c. 3., and that the plaintiff was entitled to recover.

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wit &c., and the defendant was then retained and employed by the said *J. L. Hesse* as surveyor over the said *J. Hill*, in respect of the said work, and, as such surveyor, to receive divers sums of money to be paid by the defendant to the said *J. Hill*, for and in respect of the said work; and thereupon afterwards, to wit, on &c., in consideration that plaintiff at the request of defendant would find, provide, and deliver to the said *J. Hill* such materials, goods, &c. as should be required by the said *J. Hill* to enable him to do the said work, he the defendant promised the plaintiff to pay him on request for the said materials &c. so much as he should reasonably deserve to have in that behalf out of such monies received by the defendant as aforesaid, as should become due to the said *J. Hill* for and in respect of the said work, if the said *J. Hill* would give an order to the plaintiff for that purpose. And the plaintiff avers, that afterwards &c. the said *J. Hill* did give an order to the defendant to pay him the plaintiff for all such materials &c. as he the said plaintiff should supply to the said *J. Hill* for the said work as aforesaid, out of such monies received by the defendant as should become due to the said *J. Hill* as aforesaid, whereof the defendant had notice; and the plaintiff avers, that afterwards &c. the said *J. Hill* did give an order to the defendant to pay him the plaintiff for all such materials &c. as he the plaintiff should supply to the said *J. Hill* for the said work as aforesaid, out of such monies received by the defendant as should become due to the said *J. Hill* as aforesaid, whereof the defendant had notice; and afterwards &c. the said *J. Hill* did require certain materials &c. to enable him to do the said work, and thereupon he the plaintiff, confiding in the promise of the defendant, did find, provide, and deliver to the said *J. Hill*, and at his request, the same materials &c., and therefore then reasonably de-

sired to have in that behalf the sum of 1000*l.*, and that sum became due to the said *J. Hill* for and in respect of the said work, of all which premises the defendant had notice, and was requested by the plaintiff to pay him the same sum out of such monies received by the defendant as aforesaid, as were then due to the said *J. Hill* in respect of the said work. Breach, that although the defendant, before and at the time of such notice and request, had received and had in his hands a large sum of money, to wit, the sum of 1500*l.* to be paid and then due to the said *J. Hill* in respect of the said work, and although the said order had not been in anywise annulled or revoked, yet the defendant refused to pay out of the said monies so received &c. the said sum which the plaintiff reasonably deserved to have as aforesaid, or any part thereof<sup>(a)</sup>. Among many pleas, the second was as to the first count of the declaration, that the said supposed promise in that count mentioned was and is a special promise to answer for the debt of another person, to wit, of the said *J. Hill*, and that no agreement in respect of or relating to the supposed cause of action in that count mentioned, or any memorandum or note thereof, was or is in writing, or signed by the defendant, or by any other person by him thereunto lawfully authorized, according to the form of the statute &c. General demurrer and joinder. The following point was stated in the margin for argument:—The second plea is ill in this, that it asserts the absence of any note or memorandum in writing, and signed according to the provisions of the statute of frauds, as to a special promise to answer for the debt of another, as avoiding a

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(a) The second count related to work done by *Hill* on other premises, but in other respects resembled the first. There was a similar plea to it, and a general demurrer.

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contract which, as stated in the count and not denied by the plea, is direct and not collateral.

*Erle* in support of the demurrer. The promise stated is not to pay out of the defendant's funds, but to pay the plaintiff out of those of a third person, on receiving his directions to do so. Then it is not a promise to answer for the "debt or default" of another, within 29 *Car. 2. c. 3.*, sometimes called a collateral promise, but a direct promise, binding without being written; *Hodgson v. Anderson* (a). The supplying goods to *Hill* was a loss sustained by the plaintiff at the defendant's request.

*Thesiger* contra. The question whether the contract should have been in writing or not, depends on this, whether *J. Hill*, to whom the goods were furnished, is or is not himself liable to pay for them? For if he is, the defendant's promise was to answer for his debt, and should have been in writing; *Matson v. Wharam* (b). This defendant only pledged *Hill's* property, whereas in *Simpson v. Penton* (c) the plaintiff pledged his own credit to a tradesman, by asking him in the defendant's presence to supply the defendant with goods, saying, if he would, he the plaintiff would be answerable. The defendant's promise was, therefore, held original, and the plaintiff recovered against him the sum he had paid to the tradesman. *Hill's* merely giving an order on the defendant to pay the plaintiff would not discharge *Hill's* own liability, or afford him a defence if sued; *Curon v. Chadley* (d). [Lord *Abinger* C. B. It is not here stated that *Hill* was ever indebted, or that there was any contract at

(a) 3 B. &amp; Cr. 842.

(b) 2 T. R. 80.

(c) 4 Tyr. Rep. 318.

(d) 3 B. &amp; Cr. 591.



all with him; whereas, in the case cited, *James Chadley* was originally liable. It is the common case of *A.* undertaking to pay for goods supplied to *B.*; viz. an original promise. It closely resembles *Simpson v. Pen-ton*, except that here the defendant only promises to pay out of such monies as he shall receive for *Hill*.] *Marley v. Boothby and Clark* (a) resembles this case on that point. Those defendants undertook that the plaintiff's draft on *Clark and Co.*, due at *Masterman's* at six months on a future day named, should be paid out of money to be received from *St. Philip's* church. [Lord *Abinger* C. B. That was clearly the debt of *Clark*, and the promise was, to pay his draft out of a particular fund. *Parke* B. cited *Lacy v. MacNeile* (b).] There the original debt of *Goodfellow* was extinguished, and a new one from the defendants created. So in *Fairlie v. Denton* (c) there was an agreement among all the parties that the original debt should be transferred, so that it was thereby extinguished. In every case of this kind, from *Hodgson v. Anderson* to *Crowfoot v. Gurney* (d), there was a pre-existing ascertained debt. Suppose that the defendant was to receive no money at all on account of *Hill*, was he to receive nothing for the goods he furnished to him? [*Parke* B. We cannot intend that there was any contract on which *Hill* was liable; but if there was, the case comes to a prospective assignment of a particular fund, and an attornment, so to speak, by the defendant to it. The general rule certainly is, that wherever there is an original debt, the undertaking to pay it is collateral, and within the statute; but there are exceptions, of which *Castling v. Aubert* (e) and *Williams v. Leper* (f) are instances.]

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(a) 3 Bing. 107.

(c) 8 B. &amp; Cr. 295.

(e) 2 East, 325.

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(b) 4 D. &amp; R. 7.

(d) 9 Bing. 372.

(f) 2 Wils. 302.

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LORD ABINGER C. B.—The first thing that occurs on reading this declaration is, that for all that appears from it, not only might no debt at all have been due to the plaintiff from *Hill*, upon any contract with him, but it would be quite consistent with its allegations, that he might have expressly refused to be answerable for the materials supplied. Then if he was never liable, how can this be a case of discharging his debt so as to bring the defendant's promise within the statute of frauds? It should further be observed, that this is not the case of a contract by the defendant to pay the plaintiff out of his own funds, but faithfully to apply those of another person, *Hill*, when they should come to his hands. Now that would not be a contract within the operation of the statute.

PARKE B.—I am of the same opinion. Nothing in this declaration authorizes us to imply that there was any contract by *Hill* to pay the plaintiff. If so, it is clear that the defendant's promise was original and not collateral for the debt of another within the statute. Besides, assuming *Hill* to have been originally liable the case is not within the statute, because the defendant's contract is a mere prospective assignment of funds which were to come to his hands for *Hill*, to which the defendant, as it were, attorned. In *Wharton v. Walker* the tenant never agreed with the plaintiff to pay, and never attorned to the order, which might in fact, have been countermanded at any time by a binding agreement between the parties (a).

ALDERSON and GURNEY Bb. concurred.

Judgment for the plaintiff on the second  
and seventh counts.

(a) See *Dixon v. Moor*, 2 Bing. 439.

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**FERGUSON and Another, Assignees, against MITCHELL.**

**D**EBT by the assignees of one *Bromley*, an insolvent debtor, for goods sold and delivered by the insolvent to the defendant, and on an account stated between them. The declaration stated, that the defendant was summoned to answer "the plaintiffs assignees as aforesaid," and that they demanded of him 40% which he owed to and unjustly detained from them; that he was indebted to the said *J. W. Bromley* before he subscribed his petition for his discharge from imprisonment, and before he executed the conveyance and assignment of his estate and effects according to the statute, for goods sold and delivered by the said *J. W. Bromley* before he became insolvent, to the defendant at his request, and for money found to be due from the defendant to the said *J. W. Bromley*, on an account stated between them; which several monies were to be paid by the defendant to the said *J. W. Bromley* before he became insolvent, on request, and concluded that an action had accrued to the plaintiffs, as assignees as aforesaid, to demand and have from the defendant the said several monies respectively.

Special demurrer, assigning for causes that it does not sufficiently appear by the declaration in what capacity or character the plaintiffs sue the defendant; that though the plaintiffs state themselves to be assignees of the estate and effects of the insolvent, yet they do not sue the defendant as such assignees: that the

If assignees of a bankrupt or insolvent declare in debt, so as to make it sufficiently appear that they are assignees, it is not requisite to allege that they sue "as assignees."

Assignees may sue in the debt as well as the detinet, though executors cannot.

The omission of the queritur in debt is immaterial.

The assignees of an insolvent declared in debt that the defendant was indebted to the insolvent before he subscribed his petition or executed the assignment of his estate, under the insolvent act, 7 G. 4. c. 57. for goods sold and delivered by him "before he became insolvent:"—

Held, that the time when the debt accrued was sufficiently pleaded.

In a count on an account stated, the time when it was stated should be shown, or it will be bad on special demurrer.

If a plaintiff is entitled to recover on a part of his declaration, whether consisting of one or more counts, a demurrer to the whole is too large, and entitles him to judgment on the whole record. He may release his damages as to the defective part.

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defendant was summoned to answer the plaintiffs their individual character, and not as such assignees that though the plaintiffs in the declaration state themselves to be assignees, and sue the defendant for a debt alleged to be due to the insolvent, they nevertheless complain that the defendant owes the same debt to them the plaintiffs; that though they state that the defendant is indebted to another party in a certain sum, they nevertheless demand the same debt as due to themselves; that the plaintiffs claim a debt growing out of a contract to which they were not parties; that it is not stated in the first count of the declaration, that the goods therein alleged to have been sold or delivered by the said *J. W. Bromley* to the said defendant, were sold and delivered previously to the time of subscribing or filing the petition for discharge from imprisonment or of executing the conveyance and assignment of his estate and effects under the act; that it does not distinctly appear that the said debt in the first count claimed was due or growing due at the time of filing such petition; that it does not by the first count appear but that the said goods were sold and delivered by the said *J. W. Bromley* to the defendant after such conveyance and assignment, or at what time they were sold and delivered; that it does not appear but that the account in the second count alleged to have been stated, was stated after such conveyance and assignment; and that no time is mentioned or set forth when the said alleged account was stated, and that it does not clearly appear between what parties such alleged account was stated; that it does not appear that the said several monies in the declaration mentioned were to be paid by the defendant to the said *J. W. Bromley*, or that the defendant was liable to pay the same, before the said *J. W. Bromley* subscribed his petition or filed the same, or before the

execution of the said conveyance and assignment; and that it is not stated in the declaration that the defendant has not paid the same several monies therein demanded to the said *J. W. Bromley*, before he subscribed his said petition.

Joinder in demurrer.

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*Arnold* for the defendant. First, it does not appear from the declaration in what capacity the plaintiffs sue, for the defendant is not stated to be indebted to them as assignees of *Bromley*; *Brigden v. Parkes* (a), *Henshall v. Roberts* (b). [*Parke* B. Those were cases of joinder of counts on contracts with a testator and with his executors.] In *Cobbett v. Cochrane* (c) the plaintiffs had declared as assignees, and the words in the breach "assignees as aforesaid," without *as*, were rejected as surplusage. [*Parke* B. Taking the meaning here to be "*A. and B. being assignees as aforesaid*," it is sufficient; and being such, they are entitled to recover a debt due to the insolvent before his insolvency.] Secondly, the reason why executors cannot sue in the debt and detinet, *Fitz. Nat. Brev. tit. Dette*, 119 b. 120 b., 1 *Wms. Saund.* 112 n. (1), because they are not parties to the original contract, applies equally to assignees of an insolvent. [*Parke* B. You, in fact, complain that the queritur is omitted. Now it was held surplusage before the new rules, as being but a recital of a supposed writ, *Lord v. Houstoun* (d); and since *Reg. Gen. Hil. 4 W. 4.* Appendix, No. I. no recital of the writ or mention of its contents is requisite. Those forms apply to issues, judgments, "and other proceedings." The writ itself would have been bad, if not laid

(a) 2 Bos. & P. 424.

(b) 5 East, 150; and per Lord *Ellenborough*, id. 154.

(c) 1 M. & Scott, 55; 8 Bing. 17. S. C.

(d) 11 East, 65.

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in debt. The forms of declarations provided by the rules of court, in consequence of the uniformity of process act, 2 *W.* 4. c. 39., do not require the recital of any writ. Those rules are as obligatory as if introduced in the body of that act. Would the declaration have been demurrable had the allegation been altogether omitted from it? The cases of assignees and executors are quite different, because in bankruptcy (a) and insolvency (b) the statutes transfer the debts to the assignees. *Alderson B.* Special matter, which becomes immaterial in making up the paper book, is not a fit subject of demurrer. Does not No. 15 of the rules of *Mich.* term, 3 *W.* 4., fix the form of commencing declarations? The objection might be the subject of a motion to set aside the declaration for irregularity.] Thirdly, the allegation that the debt arose for goods sold and delivered to the defendant by *Bromley* "before he became insolvent," though material, is not certain to a common intent: for his insolvency may have existed before he filed his petition or was discharged, or at the moment when he became unable to pay his debts (c). Sect. 11 of 7 *Geo.* 4. c. 57. which requires a prisoner to convey to the assignee "all debts due or growing due to the said prisoner," confers on him the title to sue. If these words vest in the assignee debts not completed as such, but becoming due before the insolvent is discharged, the declaration should allege that the cause of action accrued before the discharge. The difference between bankruptcy and insolvency as to their commencement, is, that no time can be fixed at which insolvency may be said to begin; whereas the moment of bankruptcy may

(a) 6 *Geo.* 4. c. 16. s. 63. Query, if a promise to an assignee can be implied; *Kinder v. Paris*, 2 *H. Bla.* 573.

(b) 7 *G.* 4. c. 57. s. 19.

(c) See *Parker v. Gossage*, ante, 105.

be ascertained, a man being adjudicated a "bankrupt" by act of law. These goods might have been sold more than six years ago, and yet the defendant would be precluded from pleading the statute of limitations. Lastly, no time when the account was stated is alleged in the last count. Now the rule is, that all material allegations must be laid with time, as the omission will be a subject of special demurrer. *Higgins v. Highfield* (a), *Denison v. Richardson* (b). The time forms a material part of the merits, *Stephen on Pleading* (c).

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*Platt* for the plaintiff. By sect. 19 of 7 Geo. 4. c. 57. the court may appoint proper persons, being creditors of the prisoner, to be assignees of his estate and effects, for the purposes of the act. They have the same rights by relation as if no assignment had been made to a provisional assignee. In the absence of a traverse it must be taken that the plaintiffs have done all that is necessary to vest their right to sue. As an insolvent cannot be discharged without assigning to his provisional assignee his debts "due and growing due," the time when a debt accrued due to him must relate back to the time of the assignment. [*Parke* B. The words "before he became insolvent," must either refer to the time when he filed his petition, or before he actually became insolvent in the popular sense.] The time when the account was stated sufficiently appears, though

(a) 13 East, 407.

(b) 14 East, 291.

(c) Third edit. p. 292 ; and 1 Chit. on Pl. 4th edit. 231. See *Spyer v. Thell*, post, 191 ; also 1 Adol. & Ell. 441 ; 8 Bing. 355, and the references in 3 Tyr. R. 815, note. In the *King v. Hazell*, 13 East, 142, Lord Ellenborough said, that the words *then and there* were not to be exploded altogether, "having sometimes more meaning than some persons were aware of:" and the conviction was quashed for want of them.

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the words "before then," or "then and there," are left out, for it must be before he became insolvent.

PARKE B.—With regard to the plaintiffs' title to sue as assignees, it must be taken that the cause of action accrued to them, in the absence of a plea that no cause of action accrued to the insolvent. The next remaining question is, whether it is alleged with sufficient certainty that the defendant was indebted for goods sold and delivered to him by *Bromley* before he became insolvent. Before the new rules it would have sufficed to allege in pleading that the defendant was indebted for goods sold "before that time;" and as the delivery of goods at different times might have been proved under that statement, it was not requisite to fix time with more precision. So in this case, whether the words "before he became insolvent," mean before he signed his petition, or when he became unable to pay his debts, we think the allegation good. Nor would the defendant have had any difficulty in pleading the statute of limitations, as the time when the defendant was indebted to *Bromley* is properly stated, viz. before he subscribed his petition, and executed the conveyance and assignment. The last objection, however, that the defendant is not alleged to be indebted to the plaintiffs on an account "then" or "before then" stated between them, being taken on special demurrer, is well founded, and would entitle the defendant to judgment, had not the demurrer been applied to the whole declaration, instead of the faulty part of it only. The demurrer is, therefore, too large; so that without deciding whether there is more than one count (a), it is clear

(a) The judgment in *Jourdain v. Johnson*, argued in *Trinity* term 1835, was delivered a day or two after this case occurred. See 5 Tyr. R. 524. 526. note.



that the plaintiffs' demand is divisible, so as to entitle them to recover on that part of their declaration which seeks to recover for goods sold and delivered, without proving any account to have been stated. The judgment must, therefore, be entered generally for the plaintiffs, for so much as relates to the goods sold and delivered, and for the defendant as to the rest; but as the objection to the account stated could only be taken on special demurrer, or by writ of error, the plaintiff may enter a release as to his damages in respect of that part (a).

The other barons concurred.

Judgment accordingly (b).

(a) See *Pinkney v. The Inhabitants of the East Hundred of Rutland*, 2 Sand. 379, a.

(b) See *Parker v. Gossage*, ante, 105; and *Lyde v. Barnard*, post.

### LEWIS *against* LYSTER.

**A**SSUMPSIT by the indorsee against the acceptor of a bill of exchange for 165*l.*, dated 13th April 1831, drawn by *H. J. Bouverie* upon and accepted by the defendant, payable to the order of *Bouverie* two months after date, indorsed by *Bouverie* to *Aldridge*, In an action by *A. (Lewis)*, the indorsee of a bill of exchange, against *B.*, the acceptor, (*Lyster*), the plea was, that *C.* the drawer (*Bouverie*), indorsed the bill to *D. (Calvert)*, who indorsed it to *E. (Braithwaite and Jones)*, who indorsed it to *F. (Chawner)*, in whose hands it remained when due; that *F.* being unable to obtain payment for it, returned it to *E.*, who continued to hold it till *B.* (the defendant), before indorsing it to *A.* (the plaintiff), delivered to *E.* another bill, also drawn by *C.*, accepted by the defendant *B.*, for a larger sum, which *E.* accepted, and received in full satisfaction and discharge of the former bill. The plea was held good on demurrer, though it did not show the second bill to be payable to order, and so to be negotiable; and a defective statement which followed, viz. that the defendant paid the plaintiff the amount of the second bill when due, which he accepted in satisfaction of the last-mentioned bill, and all damages sustained by the plaintiff by reason of its non-payment, was rejected as surplusage.

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and by him to the plaintiff. Plea, that long before said bill of exchange became due and payable according to the tenor and effect thereof, the said *H. Bouverie*, the drawer of the said bill of exchange, indorsed the same to one *A. Calvert*, who also, long before the said bill of exchange became due, indorsed the same to certain persons under the name, style, and firm of *Braithwaite and Jones*, who afterwards, and before it became due and payable, indorsed the same to one *Chawner*, in whose possession the said bill of exchange, at the time it became due and payable according to the tenor and effect thereof, remained and continued; and he the said *Chawner*, when said bill of exchange became so due and payable aforesaid, so being the holder thereof as aforesaid, caused the same to be presented to the said defendant for payment of the said sum of money mentioned therein, but default being made in payment thereof, the said *Chawner* afterwards, and before either of said supposed indorsements in the said first count mentioned, returned the said bill of exchange to the said persons so using the name, style, and firm of *B. and J.* as aforesaid; and the said bill of exchange remained and continued in the possession of those last-mentioned persons, who thenceforth and until and at the time of the discharge and satisfaction of the amount thereof as hereinafter mentioned, continued holders of the said bill, and entitled to receive the said sum of money therein mentioned: that afterwards, and long before the commencement of this suit, and before the supposed indorsement and delivery of the said bill of exchange, either to the said *J. Aldridge* in the said first count mentioned, or by him the said *J. Aldridge* to the said plaintiff as therein mentioned, he the said defendant handed over and delivered to the said persons the said bill of exchange, using the name, style, and firm of *B. and J.* as aforesaid.

so being holders of the said bill of exchange as aforesaid, and those last-mentioned persons then accepted and received from the said defendant a certain bill of exchange in writing, drawn by the said *H. J. Bouverie* upon and accepted by the defendant at three months date from the 26th day of *May* 1831, for 500*l.* value received, in full satisfaction and discharge of the said sum of money in the said bill of exchange in the said first count mentioned, and all damages by them sustained by reason of the non-payment thereof on the day when the same became due and payable, according to the tenor and effect of the said bill of exchange as aforesaid: that afterwards, and after the said bill of exchange was handed over and delivered to the said persons so using the name, style, and firm of *B. and J.*, to wit, on the day and year last aforesaid, the said *B. and J.* indorsed and delivered the said last-mentioned bill of exchange to one *F. Seagood*, and that afterwards, and after the said bill of exchange became due and payable, to wit, on the day and year aforesaid, the said *F. Seagood* then being the holder thereof, and entitled to demand and have and receive the amount thereof, he the said defendant paid the said *F. Seagood*, so being such holder of the said last-mentioned bill of exchange, a certain large sum of money, to wit, the sum of 506*l.* 10*s.*, in full satisfaction and discharge of the said sum of money in the last-mentioned bill of exchange specified, and all damages by the said plaintiff by reason of the non-payment thereof when the same became due and payable, according to the tenor and effect of the said last-mentioned bill of exchange: that the said bill of exchange in the said first count of the said declaration mentioned, was not transferred or delivered to the said *J. Aldridge*, or indorsed to or by him, until a long time after the said bill of exchange became due and payable, or until after the said persons

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so using the name, style, and firm of *B. and J.*, and so being holders thereof when the said bill of exchange in the said first count mentioned became due and payable, and so accepted and received the said bill of exchange of 500*l.* in full discharge and satisfaction of the said bill of exchange in the said first count of the said declaration mentioned, to wit, on &c. Verification. Demurrer, stating for special causes that it does not appear, nor is it stated in or by that plea, that the said bill of exchange for the payment of 500*l.* was payable to the order of *B. and J.* or otherwise negotiable, and therefore the said *F. Seagood* had no legal right to or interest in that bill, nor was entitled to receive the amount thereof, and give any acquittance or discharge for the same, and therefore it does not appear that that bill has ever yet been legally paid or satisfied; and also for that it is in that plea stated that the defendant paid to the said *F. Seagood* the said sum of 500*l.* 10*s.* in satisfaction of the damages by the plaintiff by reason of the non-payment thereof, whereas it does not appear that the plaintiff was entitled to any damages by reason of that non-payment, and that averment is in other respects unintelligible and informal. Joinder in demurrer.

*Humphrey.* The plea does not sufficiently show the second bill to have been negotiable, so as to satisfy the first, and prevent the defendant from being liable to be sued on it by a *bonâ fide* holder.

PARKE B.—Had the plea ended with alleging the acceptance of the second bill by *Braithwaite* and *Jones*, would it not have been a sufficient answer to the action? for as the bill was over-due in their hands, they were entitled to sue on it. The new bill is delivered to the parties entitled to the first, having been drawn

and accepted for a larger sum; then it is sufficiently averred to be given, not "for and on account" of the first bill, but absolutely "in satisfaction and discharge" of it. If the new bill is not given in satisfaction of the plaintiff's damages, all that part of the plea may be rejected as surplusage, and yet sufficient answer remain to the action.

The other barons concurred.

Judgment for defendant.

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GILBERT and Another *against* MATTHEW and THOMAS  
WHALLEY.

**WHITMORE** showed cause against a rule calling on the late sheriff of *Staffordshire* to return the *fi. fa.* issued in this cause. It had been sworn that the effects of both defendants were seized and sold. For the plaintiff, it was sworn that *Matthew's* goods, though seized, had been restored to him without sale, and that he had released all right of action for the seizure. As to *Thomas*, a fiat in bankruptcy had issued against him, so that his interest in the execution is vested in his assignees, who have agreed with the sheriff to dispose of the goods in a particular way.

A defendant became bankrupt, and a fiat issued against him after his goods had been taken in execution by the sheriff. The assignees and the sheriff made an agreement as to the disposal of the goods: Held, that the bankrupt could not compel the sheriff to return the *fi. fa.*

*J. Jervis* contra. The bankrupt having a right to the surplus, has a right to know how and for what his property is sold; *Wilton v. Chambers* (a).

Lord ABINGER C. B.—The assignees may be com-

(a) 3 Dowl. P. C. 333.

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pelled by the bankrupt to verify their accounts in the court of bankruptcy; he must look to them, and not to the sheriff to answer for the bargain they may have made. In *Wilton v. Chambers* the application was made, not by the bankrupt, but by the plaintiff *Wilton*, between whom and the bankrupt there were divided interests.

Rule discharged with costs.

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LEWIS *against* GLOSSOP.

The plaintiff will in this court be allowed the costs of a successful opposition to bail under *Reg. Gen. Trin. 1 W. 4. No. 8.*, though not claimed for him till after bail had been permitted to justify on a second occasion.

AFTER bail had been opposed, and had been admitted to justify, *Humphrey* applied for costs of a former opposition, in which the defendant's bail had been rejected. *Mansel* urged, that as the costs had not been asked for before the bail were sworn, the defendant could not now be called on to deposit them, they having become costs in the cause. He cited the case of *Knight's bail* (a).

GURNEY B. (sitting alone) adjourned the case, and having consulted the other barons, afterwards said,—By *Reg. Gen. Trin. 1 W. 4. No. 8.* [1 *Tyr. R.* 581.] the plaintiff is entitled to the costs of a former successful opposition, unless it be otherwise ordered. No reason appears why he should not have them in this case.

Costs allowed accordingly (b).

(a) 4 Dowl. P. C. 338.

(b) See *Smith v. Cooper*, 1 *Tyr.* 378; *Grant's bail*, 6 *Tyr. R.* 227.

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**SPYER against THELWELL.**

**A**SSUMPSIT by an indorsee against the acceptor of a bill of exchange. The declaration stated, that *P. Nathan*, on 10th *February* 1833, made his bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to his order 127l. 7s. 6d. for value received, five months after the date thereof, which the defendant accepted. It then proceeded thus: "And whereas the defendant afterwards, to wit, on 17th *July* 1835, was indebted to the plaintiff in 300l. for money found to be due from the defendant to the plaintiff on an account stated between them: and the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, then promised the plaintiff to pay him the said last-mentioned money on request." Yet, &c.

A count by indorsee against acceptor of a bill, stated that the drawer required the defendant to pay a sum to his order: Held, on special demurrer, that the court would see that his referred to the drawer and not to the defendant, though the last antecedent substantive.

Demurrer, stating for causes, for that the count on the bill of exchange is either ambiguous in not showing with sufficient certainty to whose order the money was to be paid, the word "his" as there used, being ambiguous; or else the word "his" refers to the last antecedent, namely, the defendant, in which case an indorsement by the defendant himself ought to have been averred: and for that the count on the account stated is informal in not stating any time when the account was stated; and that the time when the account was stated ought to have been stated with certainty; and that at least the word "then" ought to have been inserted before the word "stated." Joinder in demurrer.

*Addison* for the defendant supported the demurrer. The ambiguity is, that "his" order may mean that of

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the drawer *Nathan*, or of the defendant the acceptor. Taking these words to relate to the last antecedent which is the usual rule, unless it be impossible or incongruous, it means the acceptor's order; and *Starke v. Cheesman* (a) shows that a man may draw a bill on himself, that construction is neither absurd nor inconsistent. He cited *Walford v. Anthony* (b). It might be a promissory note if drawn payable to the order of the acceptor himself; *Shuttleworth v. Thompson* (c), cited in *Edis v. Bury* (d).

PARKE B.—In this case there are clearly two separate counts, so that only the last being bad, a demurrer to the whole declaration is too large (e). The first count is sufficient, for though *prima facie* *his* relates to the last antecedent, yet we are bound in common sense to come to the reasonable construction (f), it cannot refer to the acceptor's own order, but it has relation to that of the drawer.

BOLLAND, ALDERSON, and GURNEY Bb. concur

Judgment for the plaintiff (g)

(a) *Carthew*, 509.

(b) 8 Bingham. 75.

(c) 1 Campbell. 407.

(d) 6 B. & Cr. 633.

(e) See *Duppa v. Mayo*, 1 Saunders. 286, n. (g); Com. Dig. Pl. (C. 32); *Fergusson v. Mitchell*, ante, 179.

(f) See cases collected, *Rex v. Wright*, 1 Adol. & Ell. 448; Com. Dig. 20, b.; *Walford v. Anthony*, 8 Bingham. 75.

(g) *Semble*, the judgment would be general for the plaintiff, he remains liable for the damages on the last count. See *Samuel v. Judin*, in error, 6 B. & Cr. 336; 1 Saunders. 285, b. n. (h). Judgment was never entered up in the principal case, the defendant having paid debt and costs.



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BELL *against* HARRISON.

A Rule had been obtained by *Wightman* under 3 & 4 W. 4. c. 42. s. 22. to change the venue upon special grounds in a local action. *Watson* showed for cause that the application was too early, being before plea pleaded.

The venue will not be changed in a local action on special grounds, under 3 & 4 W. 4. c. 42. s. 22., until after plea pleaded.

*Per Curiam*.—This rule must be discharged. The words of the act are “that the court or any judge may order the *issue* to be tried in any other county or place than that in which the venue is laid.” The court cannot know what the issue will be before plea (a).

(a) *Caterill v. Dixon*, 3 Tyr. R. 705; *Rohrs v. Sessions*, 4 Tyr. R. 275; *Wetherby v. Goring*, 3 B. & Cr. 552; and *Youde v. Youde*, 4 Dowl. P.C. 32.

STEANS *against* STONEHAM.

THE defendant was arrested on the 2d October, and gave a bail-bond, which was assigned on the 20th. The plaintiff did not declare *de bene esse*. The defendant having been rendered in discharge of his bail, a rule was granted to stay proceedings on the bail-bond, on payment of costs down to the filing the declaration and the costs of the application.

The Reg. Gen. Hil. 2 W. 4. No. V. applies to prevent a plaintiff from having the bail-bond to stand as a security where he has not declared *de bene esse*, though prevented by the long vacation from doing so.

*Blackburne* for the plaintiff. The plaintiff has lost a trial; for as since 2 W. 4. c. 39. s. 11. no declaration can now be filed or delivered between 10th August and 10th October, he could not declare *de bene esse*

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before taking the assignment of the bail-bond, and is entitled to have the bail-bond stand as a security, as if he had so declared. But

*Per Curiam.*—By *Reg. Gen. Hil. 2 W. 4. No. V.* the bail-bond is only to stand as a security where the plaintiff has declared *de bene esse*. As he could not comply with that condition, he is not within the rule. He would not have lost the trial if he had in fact not taken an assignment of the bail-bond.

### WANDLEY and Another *against* SMITH.

A bastardy bond was conditioned to indemnify a parish against all manner of charges incurred for or by reason of the birth, education, and maintenance of a bastard child, and of and from all charges and demands concerning the same. The bastard before his full age, but after supporting himself for some years, married, and with his wife and family became chargeable: Held, that the obligor of the bond was not liable:

DEBT by the overseers of *East Middleton in Yar.-shire*, on a bastardy bond, dated 5th March 1806, which, after reciting that one *H. W.* was then grown with child, which child was likely to be born bastard and to be chargeable to the township, and that the defendant was father of the child, was conditioned to indemnify as well the therein named churchwardens and overseers and their successors for the time being, as also the parishioners and inhabitants for the time being, “from all manner of costs, taxes, rates, assessments, and charges whatsoever, for or by reason of the birth, education, and maintenance of the said child and of and from all actions, suits, troubles, charges and demands whatsoever touching or concerning the same.” The declaration stated the birth of a bastard child on 1st April 1806, who was still living. Breaches first, that in 1834 the overseers were forced and obliged to pay and expend, and did pay and expend certain monies in and about the maintenance of the bastard

and, secondly, that they expended monies in the maintenance of the bastard's wife and children.

Plea to each of the breaches, after craving oyer of the bond and condition, that in 1827 the said bastard child attained the age of 21 years, and had for a long time previously ceased to be chargeable to the said township, and had maintained himself.

General demurrer and joinder.

*J. Henderson* for the plaintiffs supported the demurrer. It is submitted that the liability of the obligor on the bond is not confined to the bastard's minority or remaining unemancipated, but remains during his life. Then as the township is bound to maintain his wife and children, the obligor has not indemnified the parish against the burdens occasioned by the birth of *H. W.*'s son. The word *child* is used in the bond as it would be in a will, viz. as a mere *designatio personæ*, not referring to the age of the bastard, or to his childhood in the popular sense, which would end long before he attained his legal majority. *Rex v. St. John Bedwardine* (a) only shows that a person above 21 is not within the purview of the act for binding poor 'children' apprentices. At all events this bond, if not good under stat. 6 Geo. 2. c. 31., may be good at common law as a voluntary bond; *Middleham v. Bellerby* (b). The father of a legitimate child is liable to his support during life. Had the case arisen since the new poor law act, 4 & 5 W. 4. c. 76. s. 56., it would have been clear; for relief given to the wife "and children" is by that act to be considered to be given to the husband, the bastard; and as he could not be separated from his family, such relief would be incurred by reason of his maintenance.

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(a) 5 B. & Adol. 169.

(b) 1 M. & Sel. 310.

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*J. L. Adolphus* contra was stopped by the court.

PARKE B.—The question is on the terms of the security given to the township. It is sought to extend the remedy given to these overseers by 54 G. 3. c. 17 s. 8. to the indemnifying this township against *all the consequences* of the birth of the bastard son of *Hannah White*, reckoning among them the maintenance of the bastard's own wife and family. But the object as well as the language of the bond is confined to indemnifying the township for all charges brought on it by reason of the birth, education, and maintenance of the child, as a *child*. When he attained 21, the responsibility of the parish wholly ceased. If the construction contended for by the plaintiffs were to prevail, it would extend to make the defendant liable to indemnify the parish for all the expenses of the maintenance of the bastard's descendants to the remotest generation.

ALDERSON B.—The word “child” is to be construed in the sense which it bears when used in the acts relating to bastard children. The bastard had ceased to be chargeable before attaining his age of twenty-one and having supported himself for several years, again became chargeable, after having married. In consequence of the new burden to the township, the putative father is sued on this bond; but the plea is an *en* answer to the action.

GURNEY B. concurred.

Judgment for the defendant

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PRICE *against* WILLIAMS.

**ASSUMPSIT.** The declaration stated, that the defendant, before and at the time of making the agreement, promise, and undertaking hereinafter mentioned, was vicar of the vicarage of *Lampeter Pont-stephens*, in the county of *Cardigan*, and was seised in his demesne as of freehold in right of his said vicarage of and in the messuage, tenement, lands, and premises in the said agreement mentioned and described, and being so seised on the 3d *September* 1824, it was then and there agreed upon between the said defendant of the one part, and the said plaintiff of the other part, as follows:—First, the said defendant, in consideration of the yearly rent and agreement thereafter mentioned, and on the part of the said plaintiff to be paid, done, and performed, hath agreed to set and let, and by those presents did agree to set and let unto the said plaintiff all that messuage, tenements, and lands, commonly called the *Glebe*, otherwise the *Bryn*, together with all the cottages and vicarage-house thereunto belonging in the said parish of *L. P.* in the said county of *C.*, to hold the same unto the said plaintiff from the

The case of *Wheeler v. Heydon*, Cro. Jac. 328. 2 Bulst. 83. and Brownl. 135. merely decides that a lease by the incumbent of a benefice, in whatever terms it is framed, operates in point of law as a demise, so long only as he continues incumbent: for he could not pass a greater interest. But a contract by an incumbent to demise for a term is broken by his resignation of the benefice before the end of the term.

A declaration stated that the defendant

being a vicar seised in his demesne as of freehold of his glebe, cottages, and vicarage houses, agreed to set and let the same to the plaintiff, to hold to him from a subsequent day, for the term of fourteen years, at and under a yearly rent named, payable half-yearly. A lease was to be drawn, prepared, and executed by and between the landlord and tenant, if required by either of them, at the sole expense of the landlord.

Breaches; first, that the defendant neglected to procure a lease to be executed to the plaintiff; and, secondly, that the plaintiff resigned the vicarage, and that another incumbent being inducted, evicted the plaintiff. Held, on demurrer, that the contract was well pleaded, without stating whether the legal effect of it was to operate as a present demise or not; and that after the lessee had demanded a lease, it was to be prepared by the lessor, and not to be tendered by the lessee.


A breach was so laid in a declaration as to make it doubtful whether it was laid as a breach of the agreement declared on, or as special damage only. Another breach was well pleaded. Held, that a demurrer to the whole declaration was too large.

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25th day of *March* then next ensuing the date thereof, for the term of fourteen years, at and under the yearly rent of 130*l.*, payable half-yearly; that is to say, the 29th day of *September* and the 25th day of *March* yearly, the first payment to commence and be made on 29th *Sept.* 1825; secondly, that the said plaintiff should be at liberty to let in parcels, or otherwise, any part of the said premises, or the whole, to any tenant or tenants that the said plaintiff might deem proper; and lastly, that a lease should be drawn, prepared, and executed by and between the landlord and tenant, required by either of them, at the sole expense of the landlord only, as agreed upon: and also that the said defendant thereby reserved to himself the right entering a meadow field and garden situated between *Lampeter* and *Pontfeau*, and buildings thereon, allowing the said plaintiff a fair compensation for all damages, and also that a field (described) should be exempt from the said bargain. Mutual promises. Averment, that after the making of the said agreement and by virtue thereof, the plaintiff entered into possession of the premises in the said agreement mentioned, and thereby agreed to be demised to the said plaintiff. And although the said plaintiff hath always been ready and willing to perform the said agreement in all things on his part to be done and performed; and although the said plaintiff did demand and require of the said defendant, that he should procure a lease to be executed to him the said plaintiff, of the said last-mentioned premises, to wit, on the 20th day of *January* 1834; and although the said plaintiff hath, from the time of making the said agreement hitherto, been ready and willing to execute such lease on his part, yet the said plaintiff in fact said that the said defendant, contriving &c. to injure th

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the said plaintiff, did not nor would perform his said agreement, nor his promise and undertaking, but deceived the said plaintiff in this, that he wholly neglected and refused to procure a lease to be executed to him the said plaintiff of the last-mentioned premises, when requested by the said plaintiff so to do, according to the true intent and meaning of the said agreement; and the said defendant *also* deceived the said plaintiff in this, that after the making the said agreement, and whilst the said plaintiff was so possessed of the said last-mentioned premises, the said defendant resigned the said vicarage, and one *L. L.* clerk, doctor in divinity, was duly presented, instituted, and inducted to the same, whereby the said *L. L.* became seised of the said last-mentioned premises, as in his demesne as of freehold in right of his said vicarage, and being so seised, the said *L. L.* in *Michaelmas* term 1833 brought an action of ejectment in &c. at *Westminster*, against the said plaintiff, to recover possession of the said last-mentioned premises, of which said action the said defendant had notice, but wholly neglected and refused to defend the same, whereupon the said *L. L.* obtained judgment in the said action, and issued a writ of possession thereupon, whereby the said plaintiff was turned out of possession of the said last-mentioned premises; by means whereof the said plaintiff hath lost and been deprived of divers great gains and profits which he would have enjoyed by and from the possession of the said last-mentioned premises, for the term in the said agreement mentioned, and hath lost all the benefit and advantage of divers large sums of money which he the said plaintiff had laid out and expended in and about the improvement and cultivation of the said last-mentioned premises, and hath been deprived of divers large crops which were growing upon the said last-mentioned premises at the time when the said plaintiff was so

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turned out of possession thereof by the said *L. L.* as aforesaid. Damage 1000*l.*

Demurrer, assigning for causes that although it is alleged that the plaintiff demanded and required the defendant to promise a lease to be executed to the plaintiff, it is not averred that any lease was tendered to the defendant for execution; and further, that it is not possible to discover from the declaration whether the averment that the defendant resigned the living and that his successor ejected the plaintiff, is intended for a special statement of damage, or as a breach of the agreement declared on, or of some agreement to be implied therefrom, which ought to have been expressed in the declaration; and further, that it is uncertain whether the plaintiff by his declaration means to plead the contract there stated as amounting to an actual demise, or as being merely an agreement for a lease, and also, &c. The marginal note on the demurrer was, that the plaintiff intended, among other things, to insist that there was an implied agreement in the contract declared upon, that the tenancy was to endure so long only as the defendant continued vicar.

*E. V. Williams* in support of the demurrer. It is not sufficient to state the agreement in fact made by the parties, without going on to allege the legal operation and result of it. In *Monnington v. William* (a), *Twizden J.* said, where a man in pleading sets forth his title by a conveyance, in which are the words, "give, grant, release, confirm, bargain, sell, &c. he must express to which of them he will use it." (b) Since *Goodtitle v. Way* (c), an agreement to let, and an agreement to take with a stipulation for executing a future lease, operate

(a) 1 Vent. 109, which seems the case cited in 2 Wms. Saund. 97 c. no

(b) See also per Pollexfen C. J. *Baker v. Lade*, 3 Levinz, 291.

(c) 1 T. R. 735.



ment by the defendant, not for actual demise, but wanting a future lease, eviction is no breach of agreement; whereas if it operates as an actual demise for fourteen years, the declaration should have stated it to be such, treating the case as if a covenant for quiet enjoyment had been made between the parties. The breach is ambiguous; for if the agreement be taken to be one of actual demise, with a stipulation for further assurance, the grant of a new lease after the defendant had resigned the vicarage would be a breach, the grantor having no interest then, and there would not have been an estoppel. [*Parke B.* The agreement does not stipulate for a lease under seal.] If the action cannot be maintained, for the plaintiff did not tendered a lease to the defendant for his execution, *Baxter v. Lewis* (b). The onus of preparing the lease is on the lessee, though the whole expense of making in this case is to be borne by the lessor as well as the vendor. [*Parke B.* In practice the vendor pays the expense of executing the conveyance, where no express stipulation is interposed, as in this case.] The declaration implies that this agreement should only endure so long as the defendant continued vicar, *Wheeler v. Taylor* (c). That was a case where a parson made

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continued parson there," was not a variance, but supported by the evidence.

*John Evans* contra. If the matter respecting the eviction be only laid in aggravation, and as special damage, it is not demurrable (a). But if, as the plaintiff contends, it is sufficiently stated to constitute a second breach, the demurrer to the whole declaration is too large, *Powdick v. Lyon* (b). *Charnley v. Winstanley* (c) though not exactly in point, because after verdict, is analogous, and shows that if a breach of the actual agreement between the parties sufficiently appears on this record, the plaintiff will have judgment. It was not necessary to state the instrument as operating by actual demise; for whether it did or not the plaintiff would be entitled to recover. The plaintiff was not bound to tender the lease for the defendant's execution, for the demand of it was in this case the only act required to be done by the plaintiff as lessee. Upon that the defendant, as lessor, was bound to procure the lease to be prepared, as well as executed, at his sole expense and was to do the first act, which is the distinction established in *Lacey v. Lacey* (d), referred to by Chief Baron Comyns in his *Digest*, tit. *Pleader* (C. 55). The opinion of Houghton J. in *Wheeler v. Heydon*, as reported in *Brownlow and Bulstrode* (e), differs from the position on the other side, that any such contract arises in law, and is adopted in *Bac. Ab.* tit. *Leases* (F) (f) and *Watson's Clergyman's Law*. In the later case of *Thomas v. Rudge* (g), where a person covenanted with

(a) *Amory v. Brodrick*, 5 B. & Ald. 712; *Duffield v. Scott*, 3 T.R. 374 though bad on error, or in arrest of judgment; *Sutton v. Johnstone*, 1 T.R. 498, 510.

(b) 11 East, 65.

(c) 5 East, 266; and see *Le Bret v. Papillon*, 4 East, 502.

(d) Cro. Eliz. 249.

(e) 2 Vol. 83.

(f) 4 Vol. 94, Gwillim's edit.; and see 1 Bythewood on Conveyancing by Jarman, 74.

(g) 3 Bulstrode, 202; 4 Bac. Ab. 943.

A. absolutely, that he should have his tithes for thirteen years, without saying "if he should so long live and continue incumbent," and before the expiration of the term resigned his benefice, *per quod* his lessee was ousted of his tithes, the court of King's Bench held the parson liable to him on the covenant, the resignation being an immediate avoidance of the lease at common law.

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E. V. Williams in reply. Whether the first breach is a principal breach, or ancillary to that stating the eviction, or the reverse, the objections taken go to the whole declaration. The allegation is not more certain than if it had been that the defendant demised or agreed to demise (a). [*Parke B.* We have no doubt on the case, but as there is some obscurity in the words "set and let" in the declaration, we will consider it.]

*Cur. adv. vult. (b)*

The judgment of the court was afterwards delivered in *Hilary* term by

PARKE B. (after stating the pleadings.)—One objection to the plaintiff's right to recover on this declaration was, that there was an implied agreement in the contract declared upon, that the tenancy was to endure so long only as the defendant continued vicar. This objection was founded on the case of *Wheeler v. Heydon* (c), in which the declaration for not setting out tithes stated the plaintiff's title by lease of tithes by the parson for six years, if he lived so long and continued parson there; and proof of a lease for six years, "if he lived so long," was held to support

(a) See *Rex v. Sadler*, 2 Chitt. R. 519; *Rex v. Pain*, 5 B. & C. 251; *Rex v. North*, 6 D. & R. 143.

(b) Viz. *Parke*, *Alderson*, and *Gurney B.* Lord Abinger was sitting in equity, and *Bolland B.* was at chambers.

(c) Cro. Jac. 328.

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the averment; for the condition "if he lived so long and continued parson" is no more than what the law speaks. From the report of the same case in *Brownlow*, 135, the decision upon this point is said to have been adjourned, in consequence of an opinion of *Houghton's*: and the court to have been equally divided. It appears, however, from the report in 2 *Bulstrode*, 83, to have been finally decided. Be that as it may, that case decides this point, merely, that a lease by a rector, whatever its terms are, operates in point of law as a demise, so long only as he continues parson; for he could not pass a greater interest. The declaration does not describe the contract between the parties, but the estate which passed by the demise; and the case closely resembles that of *Pike v. Eyre* (a). It does not, however, admit of a doubt, but that where the contract between the parson and the tenant is for a term of years, a breach of such contract is committed, if the parson resigns, *Rudge v. Thomas* (b). This objection therefore cannot prevail.

The next objection was, that the breach for not executing a lease was ill assigned, because it was not averred that a lease was tendered by the plaintiff. But as the lease was to be prepared at the *sole expense* of the defendant, he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of the contract, to prepare a lease or conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but where all that is stipulated for is, that it shall be prepared at the expense of the lessor, and there is no context to explain it, it must be intended that the lessor is to prepare it also. This breach, therefore, is well assigned.

(a) 9 B. &amp; C. 909.

(b) 3 Bulst. 202.

The next objection is, that the allegation that the defendant resigned the living, and that his successor ejected the plaintiff, is so made, that it cannot be known whether it be a breach of an agreement, or a special damage: but as the demurrer is to the whole declaration, and the other breach is well assigned, the demurrer is too large, and this objection cannot prevail (a), supposing it was otherwise valid, which we think it was not.

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The last objection is to the whole declaration. It is, that it is uncertain whether the plaintiff pleads the contract as a demise, or merely as an agreement for a lease: and if the former, it is urged that the rule of law is, that it ought to be pleaded according to its legal effect. There is no doubt but that in deducing title, it is the established rule, that conveyances are to be pleaded as they operate; for which several authorities were cited, to which that of *Moore v. Earl of Plymouth* (b) may be added. But here the plaintiff does not deduce title to the property by lease. He is declaring on the contract of the defendant that he shall hold for the term of fourteen years, and suing for a breach of that contract; and there is a sufficient contract to that effect alleged in this declaration. There is no uncertainty in the declaration; for it is pleaded as an agreement that the plaintiff shall hold for fourteen years, and also that a regular lease should be executed, if required, but only in that case. Our judgment must be for the plaintiff.

Judgment accordingly.

(a) See *Fergusson v. Mitchell* and *Spyer v. Thelwell*, *ante*, 179. 191. and 1 Saund. 285 b. note (9).

(b) 5 B. & Ald. 70; and see Stephen on Pleading, 389, 1st edit.



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DEFRIES *against* SNELL.

To an action of assumpsit the defendant pleaded, first, the general issue as to part of the demand; and fourthly, that the debt for which the action was brought did not amount to 40s., and that he the defendant was resident within the jurisdiction of the *Tower Hamlets* court of Requests' Act, 23 Geo. 2. c. 30. At the trial the jury found a verdict for the plaintiff under the general issue, damages 11. 6s., and for the defendant upon the fourth plea. The defendant having obtained a rule nisi to enter a suggestion under the act to deprive the plaintiff of his costs, and to entitle the defendant to costs, the court, on showing cause, discharged the rule, on the ground that the defendant might obtain the benefit by entering up judgment under the fourth plea.

**A**SSUMPSIT for work done and materials  
 Pleas: first, non assumpsit, except as to 7s.; secondly, payment of that sum; thirdly, a fourthly, that the debt for the recovery of which the action was brought did not amount to 40s., and that the defendant, at the time the action was commenced, was a person residing and inhabiting within the jurisdiction of the court of requests mentioned in a certain act of parliament made at *Westminster*, in the county of *Middlesex*, in the 23d year of the reign of our late sovereign lord *George* the Second, late king of *Great Britain*, intitled "An act for the more easy and speedy recovery of small debts within the *Tower Hamlets*," and which was then in force, and still was liable to be carried and summoned to appear at the said court of requests for such debt; upon which pleas issue was taken. The sum claimed by the plaintiff in his particulars was 21. 9s., being the balance of a debt of 91. 9s. At the trial before one of the *Justices* of the city of *London* under a writ of *traverse*, evidence was given on the part of the defendant in support of the fourth plea. The jury found a verdict for the plaintiff upon the first issue, damages 11. 6s.; for the defendant upon the second issue, and a verdict for the plaintiff upon the third; and, with respect to the fourth issue, they found that the sum sought to be recovered by the plaintiff did not amount to the sum of 40s., and that the defendant, at the time the action was commenced, resided within the jurisdiction of such court of requests. *Busby* having obtained a rule to show why the plaintiff should not bring the writ of *traverse* and indorsement thereon into court and file the plea, the court refused to grant the rule.

The court, on the ground that the defendant might obtain the benefit by entering up judgment under the fourth plea.

so that the defendant might enter a suggestion thereon, that the debt recovered did not amount to 40s., and that at the time of the commencement of the action the defendant was resident within the jurisdiction of the court of requests for the *Tower Hamlets*, and why the plaintiff should not pay to the defendant the costs of the suit, together with the costs of the application, pursuant to the above act of the 23 Geo. 2. c. 30.;

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*C. Jones* now showed cause. By the 8th section of the act it is provided, that if the judge who tried the case shall certify that there was a probable or reasonable cause of action for 40s. or more, that the plaintiff shall not be liable to pay costs, but shall recover his costs of suit as if the act had not been made. Here the action was tried before the secondary, who had no power to give the certificate spoken of in the above section, and consequently this cannot be considered as a case within the act, for *non constat* but that such a certificate would have been given, if the cause had been tried before a judge of one of the superior courts.

Also, by the 7th section, the fact of the defendant being resident within the jurisdiction of the court of requests is to be proved by sufficient testimony, to be allowed by the judge or judges of the court where the action shall depend; and on such evidence being given, the said judge or judges are not to allow the plaintiff his costs, but to award that he shall pay costs to the defendant. It is clear from this clause that the plaintiff cannot be deprived of his costs and made to pay those of the defendant, except the cause has been regularly heard before a judge of the court in which the suit has been brought. The finding of the jury on the fourth plea was erroneous upon the evidence adduced at the trial. [*Parke* B. Notwithstanding the fourth plea, the plaintiff is entitled to judgment upon

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the record.] By the 2 W. 4. c. 65. the jurisdiction of the court of requests of the *Tower Hamlets* is extended to debts under 5*l.*, and the act gives the party an option to proceed either in the superior courts or in that court. By this statute the restriction of the 2 G. 2. c. 30., compelling the suitor in a debt not amounting to 40*s.* to bring his action in the court of requests is taken away. It may be contended that the 2 W. 4. only applies to debts between 40*s.* and 5*l.*; but here the action was not brought for an original demand of 2*l.* 19*s.*, but for a balance of a larger sum (*a*). [*Parke B.* The jury have found that the demand was under 40*s.*, and we are bound by the record. Why does not the defendant act upon the fourth plea? *Alderson J.* He should enter up judgment upon it.]

**PARKE B.**—This rule must be discharged with cost. The defendant will have the full benefit of the fourth plea.

The other barons concurred.

Rule discharged with costs, which were to be deducted from the defendant's costs of the action; the plaintiff to deliver the writ of *trin* and indorsement to the defendant's attorney.

(*a*) See *Jenkinson v. Morton*, Easter term 1836, *post*.



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BEAUMONT *against* DEAN.

A Rule was granted for delivering up the bail-bond to be cancelled on entering a common appearance, on the ground that the defendant had been twice arrested for the same cause of action, without a judge's order for the second arrest. A bail-bond which had been given on the first arrest had been cancelled on the authority of *Gunn v. Mac Clintock* (a).

Before showing cause, it was contended for the plaintiff, that the affidavit on which the rule was granted could not be used, it appearing to be sworn before a commissioner, who was now sworn to be "one of the present attornies to the defendant in this cause."

It was answered, that the commissioner should have been shown to be the defendant's attorney in the cause at the time the affidavit was sworn; *Reg. Gen. Hil. 2 W. 4. s. 6. (b)*. To this the court assented.

Cause was then shown on affidavits denying that the second arrest was for the same cause of action as the first; but as that appeared doubtful on the affidavits, and the amount was the same, the court referred that point to the master, with the costs of the rule.

*Hayes* in support of the rule; *Humfrey* showed cause.

(a) 4 Tyr. R. 988.

(b) 2 Tyr. R. 341.

An affidavit cannot be impugned for being sworn before the attorney in the cause, unless it appears that he was such attorney at the time the affidavit was sworn; and it is not enough that he was at that time "one of the attornies" to the defendant in the cause. (*Reg. Gen. Hil. 2 W. 4. s. 6.*)

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CHALKLEY *against* CARTER.

If the copy of a writ of summons in assumpsit, which is served on a defendant, omit the words "on promises," it is not a ground for setting aside the writ itself, but only an objection to the copy.

*Reg. Gen. Hil. 2 W. 4. No. 33.* prevents an application to set aside proceedings for irregularity, except within a reasonable time, "nor after a fresh step taken by the party applying:" Held, that entering an appearance by the plaintiff for the defendant was not such a step of the defendant, as would prevent him from objecting to an irregularity in the copy of the writ served.

THE served copy of the writ of summons omitted the words "on promises." On summons at chambers to set aside the writ, it was urged, that though the copy was bad, the writ might be good; and also that it was too late to apply, as the plaintiff had taken another step, viz. entering an appearance on the defendant's behalf; *Reg. Gen. Hil. 2 W. 4. No. 33.* [*ante*, Vol. II. p. 343.] The writ having been set aside by the order of the learned judge, with costs, the court granted a rule to set aside that order. Cause was shown, that the parties having applied to a judge, were concluded; as *Reg. Gen. Mich. 3 W. 4. No. 10.* [*ante*, Vol. III. p. 4.] gives leave to apply to the court, or a judge; and that, at all events, it should be shown that the judge's order was wrong by producing the writ actually issued, so as to prove that it had not the same omission in it as the copy.

PARKE B.—It is not shown that the writ itself was not in the regular form. Then as the point that the writ might be good, though the copy served might be mistaken, was taken before the learned judge, his order must be set aside. As to the other point, No. 33 of *Reg. Gen. Hil. 2 W. 4.* only applies to the party's own act, and the appearance by the plaintiff for the defendant makes no difference in this case.

Rule absolute on the first ground.

*Thomas* in support of the rule, *Martin* contra.

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NOEL *against* BOYD (a).

**ASSUMPSIT** against the defendant as the acceptor of a bill of exchange, dated 11th *October* 1834, for £100, drawn by one *Rich*, indorsed by him to *Newton*, by him to *Lewis*, and by *Lewis* to the plaintiff, counts for money paid to the use of the defendant on an account stated. Plea to the first count, the defendant accepted the bill for the accommodation of *Rich*, and without any value or consideration, that the said indorsement by *Rich*, in the first count mentioned, was an indorsement in blank; and that *Rich* never delivered the said bill to the said *Newton*, but that he delivered it to one *Lewis Levy*; and that the said *Lewis Levy* then received, and from him, until one *Lawrence Levy*, as hereafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the said *Rich*, and not otherwise; to wit, for the purpose and in order that he the said *Lewis Levy* might get the said bill discounted for the said *Rich*, and that he should deliver and pay the proceeds thereof, upon such discounting, to the said *Rich*; and of which the said *Lawrence Levy*, before and at the

In *assumpsit* by indorsee against acceptor of a bill of exchange, the defendant pleaded special facts, ascribing fraud to the drawer and subsequent indorsers; and alleging that the plaintiff, as well as the indorsers prior to him, took the bill with a knowledge of the facts, concluded by averring that the plaintiff was not a *bonâ fide* holder of the bill for value. The plaintiff replied that he was. The plaintiff called a witness, who proved that he applied to the plaintiff to discount the bill, which he did,

(a) The original pleadings resembled those in *Noel v. Rich*, *Trin.* 1835, but were amended after the plaintiff in that action obtained judgment on demurrer.

After obtaining the witness's name to it. The judge, after observing that the plaintiff had admitted the allegations of fraud contained in the plea, left the case to the jury to say, on the credit of the witness, whether the transaction was *bonâ fide* on the part of the plaintiff. Verdict for the defendant. *Alderson* and *Gurney* Bcs. were of opinion that the verdict was supported by the evidence; while *Parke* and *Bolland* thought the jury might have been misled as to the extent of the admission on the record, and inclined to send the case to a new trial.

Whether a plaintiff, by taking issue in his replication on one only of several facts stated in a plea, admits the rest, for any purpose besides that of pleading on the record; *e.g.* for the purpose of considering them at the trial, as if they had been actually established by testimony; *quære*.

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time when the said bill was delivered to him as he after mentioned, had notice: and the defendant further saith, that the said *Lewis Levy* fraudulently and consciously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit, on the 12th day of *October* 1834, delivered the same to the said *Lawrence Levy*, and the said *Lawrence Levy* took and received the same from the said *Lewis Levy* upon other and different terms and without discounting the same for the said *Rich* and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing a debt then alleged to be due from the said *Lewis Levy* to the said *Lawrence Levy*; and the said *Newton, John Lewis*, and the plaintiff, before and at the said time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid: and the defendant further saith, that no consideration or value whatever, except as aforesaid, hath been given or had and received by the said *Rich*, or to or by any other person on his behalf or at his request, for or on account of the said indorsements of the said bill by the said *Rich*: and further, that the plaintiff hath not been, nor is he a *bonâ fide* holder of the said bill for any value or consideration made, done, or given by him on that behalf. Replication, that the plaintiff was and is the *bonâ fide* holder of the bill in the first count mentioned, for value and consideration given by the plaintiff in that behalf on which issue was joined.

At the trial before *Gurney B.* at the *Middlesex* sittings after last *Trinity* term, *John Lewis* was called as a witness for the plaintiff. He swore that he first saw the bill in *November* 1834, when it was given him by *Newton*, who was a cousin of his and an

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torney: that he applied to the plaintiff to get the bill discounted, who required him to put his name upon it: that he received the bill in order to obtain the discount from *Spyer* an attorney, with whom the witness was an articled clerk: that the plaintiff gave him the amount in two checks, which the witness got cashed immediately, and also in money, making, with the discount, the sum of 100*l.*, but no one else was present: that he handed over the whole of the money to *Newton*. Both the checks were produced and proved by the witness, as was also the letter he wrote to the plaintiff. On cross-examination, he said that *Lawrence Levy* was his brother and a sheriff's officer, and that he did not know or believe that he had any thing to do with the transaction. The defendant called no witnesses. The learned judge, in summing up, told the jury that the facts stated in the plea were admitted to be true, they not being denied in the declaration; that the question for their consideration was, whether the plaintiff had given value for the bill; expressly adding, that if they believed the witness *Lewis*, they ought to find for the plaintiff. Verdict for the defendant.

*Humfrey* moved for a new trial; first, on the ground that the verdict was against evidence, and also for misdirection by the learned judge, who, when he told the jury that the facts stated in the plea were admitted, omitted to draw the distinction, that they were to be taken as so admitted for the purposes of pleading only. [*Alderson* B. It was for the defendant to show that the alleged *bonâ fide* holder knew under what circumstances the bill was obtained. The plaintiff admits on the pleadings that the bill was concocted in fraud to a certain extent, not in fact, but only for the purposes of pleading. He might know the fact subsequently, and yet it might have had no effect on his conduct at the

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time. Still the allegation that the bill was fraudulent obtained must be considered to be involved in issue, and the jury were to judge of the credit of *L. Newton* was not called, nor any reason given why should choose to have *Lewis's* name put on the bill. The court were of opinion that there was no misdirection (a), but granted the rule upon the ground of verdict being against evidence.

*Crowder* now showed cause (b). This court will not disturb the verdict, it being a case purely for the consideration of the jury upon the credit due to the witness. With regard to the replication, it was perfectly competent for the plaintiff to have put in issue a replication of the facts stated in the plea; for it has been decided (c) that he might have replied *de injuriâ*. [*Parke B.* No case cited only shows that a replication in the nature of *de injuriâ* would be good. That makes all the difference (d).]

*Humfrey* contra. The verdict for the defendant obtained by a prejudice of the jury existing against the witness *Lewis*. The admission made in this replication, though made merely for the purposes of plea, was treated by the judge as concluding the plaintiff's point of fact. In addition to the *viva voce* evidence of *Lewis*, the banker's checks were produced, as was his own letter to the plaintiff, which bore every mark of authenticity. [*Parke B.* Was any question asked whether the plaintiff had not sued *Newton*?] There

(a) See *Stephen on Pleading*, 3d ed. 202, 218, and note; 2 *Saunders* n. (1); 2 *Mod.* 40.

(b) Before *Parke*, *Bolland*, *Alderson*, and *Gurney* Bs.

(c) *Noel v. Rich*, 4 D. P. C. 228.

(d) See now *Isaacs v. Farrer*, *post*; and *Griffin v. Yates*, 2 *Bing.* 579.

nothing said about him except an observation of the defendant's counsel to the jury. [*Alderson* B. It is quite clear that the plaintiff would have succeeded with the jury if he had been called, and had given a satisfactory account of the transaction. *Parke* B. My impression is, that the jury did not disbelieve the witness *Lewis*, but that, in arriving at the conclusion they did, they presumed something beyond his evidence; and the question is, whether there is any legal ground to support that presumption. *Alderson* B. I cannot see how the jury could throw the facts stated in the pleadings out of their consideration; for the issue was, whether full value had been given by the plaintiff for the bill, that is, full value without notice of the previous fraudulent transactions; and here the plaintiff who does not call *Newton* to prove he had no such notice.]

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*Cur. adv. vult.*

Afterwards, on 23d November,

*PARKE* B. said,—This was a motion for a new trial, on two grounds; first, that the verdict was against the evidence, and, secondly, that the observations of the learned Judge respecting the plaintiff's admissions on the pleadings, had as much effect on the jury as if it had been proved before them in fact, that the plaintiff did not come by the bill in a legal manner. As the jury may have supposed that the facts stated in the plea were to be taken as true in fact, because they were not denied by the plaintiff in his replication, I should have been better satisfied by sending the case to another trial, particularly as the plaintiff's evidence is uncontradicted by the defendant, and a transaction must be taken to be *bonâ fide* till the contrary is proved. In this view my brother *Bolland* concurs with me; but as my brother *Gurney*, who tried the cause, is perfectly satisfied with

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the verdict, and my brother *Alderson* adheres to the opinion he formed on the argument, and considers the jury to be sufficiently warranted by the evidence in arriving at the conclusion that the plaintiff did not come fairly by the bill in question, the rule will not be made absolute.\*

### GOUGENHEIM *against* LANE and five Others.

Where a plaintiff sues in trespass in *formâ pauperis*, and obtains a verdict for nominal damages, he is entitled to full costs, but only of those witnesses, and of such parts of the briefs as were requisite to support the count on which he succeeded, after abandoning the others.

A pauper plaintiff is not within *Reg. Gen. Hil. 2 W. 4. No. 74.*, nor can the costs of such of several defendants as have got verdicts, be deducted from his general costs of the cause.

THE plaintiff sued in *formâ pauperis* for assaulting and imprisoning him. The declaration contained four counts, the last being for an imprisonment on 12th *October* 1832. Each defendant pleaded the general issue before the new rules of pleading began to operate. The plaintiff's arrest was on a *capias ad satisfaciendum*, which issued from the court of hustings in *London* on 12th *October* 1832, and was set aside for irregularity. He had been before arrested on a writ, which was set aside for the invalidity of the affidavit of debt. He also sought to recover for two previous illegal arrests. As one of the defendants was only concerned in the arrest on 12th *October* 1832, all the former counts were abandoned by the plaintiff. Verdict for plaintiff against three of the defendants, *Lane*, *Barrowcliff*, and *Davies*, on the last count, with a farthing damages, and for those defendants on the three first counts. Verdict for the other three defendants on all the counts. Lord *Lyndhurst* C. B. who tried the cause, refused to certify to deprive the plaintiff of costs. The plaintiff's attorney charged all the defendants with the costs, and delivered his bill to *Lane's* attorney, who acted for all of them. At the taxation it was urged that the plaintiff having recovered less than 5*l.*, was only entitled to costs out of



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pocket, but the master relied on the fact of the postea giving him 40*s.*, and taxed him his costs in the usual way at 8*l.* 12*s.* From this he took off 10*l.* 17*s.* 6*d.* as costs due to *Lane*, *Barrowcliff*, and *Davies*, for their verdict on the three first counts, but would not give any costs to the defendants who had a general verdict. A rule was granted for the master to review the taxation, by allowing the plaintiff only his costs out of pocket, and to confine the costs to so much of the briefs and evidence as he should consider necessary to make out the plaintiff's imprisonment on 12th *October* 1832, and the subsequent facts connected with it; and by deducting the costs of the acquitted defendants from the plaintiff's costs.

*Crowder* and *Mansel* showed cause. First, a pauper plaintiff who recovers a verdict, though for less than 5*l.*, is as much entitled to receive costs as another plaintiff. His non-liability to pay costs for his own default does not oust his right to receive them for the default of the defendant, *Price v. Brown* (a), *Blood v. Lee* (b). Secondly, the plaintiff is entitled to the costs of testimony adduced to establish the irregularity of the first process, and to connect it with the arrest in *October* 1832. Thirdly, in the common case the acquitted defendants would be entitled to their costs, and to deduct them from the plaintiff's costs; *Reg. Gen. Hil. 2 W. 4. s. 74.*; but that rule only applies where a defendant would be entitled to receive costs from a plaintiff. Now as this plaintiff sues as a pauper, he would not have paid costs to these three defendants, had they had a verdict; then they cannot have their costs deducted from his, for that would be in fact to receive them from a pauper plaintiff.

*Erle* contra, in support of the rule. The course of

(a) 1 B. &amp; P. 39.

(b) 3 Wils. 24.

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practice has been unvaried, that costs out of pocket only are taxed to the attorney of a pauper who recovers less than 5*l*. The officers of the court, in this case, refuse their fees for passing the record, sealing subpoenas, and court fees &c., whereas they take them when the verdict is for 5*l*., as they are then taxed against the adversary. On the second point, most of the witnesses were wholly unnecessary to prove the imprisonment on 12th *October*. One of the defendants was not implicated in any imprisoning of the plaintiff before the 12th *October*, and the evidence at the trial was confined to that day. Nor does *Reg. Gen. Hil. 2 W. 4. s. 74.* apply to paupers.

*Per Curiam (a).*—The authorities show that though the plaintiff does not pay costs, he is entitled to receive them, and to have his costs taxed in the common manner, unless the judge certifies to deprive him of them, as he might do. The taxation is so far correct but it should be referred back to the master to be reviewed, by striking out costs allowed by him to the plaintiff, for imprisonments alleged to have taken place before that on 12th *October*. As to the last point, the stat. 23 *H. 8. c. 15.* gave no costs to any defendant where a verdict was recovered in trespass against any one of several defendants; and 8 & 9 *W. 3. c. 11. s. 1* only gives costs to such one or more of several defendants in trespass as are in fact acquitted by verdict. Then as we could not give costs to these defendants to be paid by a pauper plaintiff, we cannot order them to be set off against him.

Rule absolute to review the taxation accordingly.

(a) *Parks, Bolland, Alderson, and Gurney B.*

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GOODRICKE *against* TURLEY.

COUNTRY bail by affidavit. Before proceeding to justify them, *J. Jervis* applied for costs, they having been before rejected; and cited *Smith v. Cooper*, a prisoner, (a). *Archbold* contended that bail by affidavit were not within the rule, but only bail who appear in person to justify; *Henderson v. Dorling* (b).

Where bail justify by affidavit, having been before rejected, the defendant must make a deposit for costs.

GURNEY B. decided that the rule applied as well to country as town bail. The deposit of 5*l.* having been accordingly made, *J. Jervis* produced an affidavit that one of the bail had been before rejected at chambers by Lord *Denman* C. J.; but as the affidavit did not state that he was marked in the master's book as rejected for insufficiency, he was suffered to justify.

An affidavit opposing a bail on the ground of their having been previously rejected, will not suffice, without showing that he was rejected for insufficiency.

(a) 1 Tyr. R. 379.

(b) MS. Archb. Pr. 171, n. b.; *Tennell v. Gardner*, *ibid.*

CASLEY, Assignee, *against* SMYTHE.

THE plaintiff sued as assignee of a bail-bond. A rule had been granted to set aside the proceedings, on an affidavit entitled "*John Casley, assignee, &c.*," without stating of whom he was assignee. On showing cause, the decision of *Littledale* J. in the practice court of King's Bench, in *Phillips v. Hutchinson* (c) was relied on, where that learned judge discharged a similar rule, and would not allow an amendment.

An affidavit is bad in which the name of a plaintiff suing as assignee is described in the title thus, "*J. C., Assignee, &c.*"

*Per Curiam.*—Whether the proceedings be wrongful

(c) 3 D. P. C. 20.

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or not on the part of the plaintiff, the affidavit used set it aside must be regular. The rule must be

Discharged.

*Miller* in support of the rule, *Humfrey* against it.

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PIERCE *against* WILLIAMS.

Where in an action for a libel, a peremptory undertaking to try was enlarged, and just before the cause was called on, at the sittings after *Trinity* term, the senior counsel for the plaintiff left the court, upon which the plaintiff's attorney being taken by surprise, and obliged to act on the emergency, withdrew the record:—the court in *Michaelmas* term enlarged the peremptory undertaking to try till the sittings after that term.

CASE for libel. The plea bore date 17th *Februa* 1834. Issue was joined on 10th *May*, and not of trial was given for the sittings after *Trinity* term that year. The notice of trial having been countmanded, a rule for judgment as in case of a nonsuit was obtained on behalf of the defendant, which was discharged on a peremptory undertaking to try at the first sitting in *Hilary* term 1835. Fresh notice of trial was given on 13th *January* 1835, for the first sitting in the term. The plaintiff delivered briefs, and was ready to try; but on the 19th, just before the sitting day, a rule for a special jury was obtained by the plaintiff. On application to a baron to discharge that rule, on the ground that it was obtained for delay, the plaintiff stated that delay was desirable till another cause then pending against the defendant had been tried, as he expected that evidence material to this cause would be given (a). Hereupon the judge enlarged the peremptory undertaking to the sitting after the term. The appointment to nominate the special jury having been made, the rule for it was discharged on 3d *Februa* and the peremptory undertaking was enlarged till the

(a) See *Clarke v. Allbutt and another*, ante, 71.

first sitting in the next *Easter* term, on payment of costs. On 15th *April* 1835, a fresh notice of trial was given for that sitting, the cause was set down for trial, and continued on the paper till the sittings after *Trinity* term. No special juries were taken at the sittings in or after *Easter* term or in *Trinity* term. On the 30th *June* 1835 the cause was called on, in the absence of the senior counsel for the plaintiff, who was then addressing a committee of the House of Commons. Thereupon the plaintiff's attorney withdrew the record, not considering it prudent to try without his assistance. The counsel had been in attendance till very shortly before the cause was called on; and it was sworn that until he then left the court, the plaintiff's attorney had no intimation or reason to suppose that he would not be in attendance, and was taken quite by surprise, and obliged to act on the emergency.

Within the four first days of term,

*Addison*, for the plaintiff, obtained a rule to enlarge the peremptory undertaking to the sitting after *Michaelmas* term, which was made absolute on the terms of the plaintiff's paying the costs of the day, and of this application.


*Platt* showed cause.

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decided that she had not appealed in due time. From the latter decision she appealed to the Court of Delegates, who decided against the appeal, and remitted the cause to the Court of Arches, which directed a relaxation of the inhibition; which being served upon the judge of the Consistory Court, he ordered the cause to proceed in that court as though no appeal had been made. Mrs. Smyth brought in additional articles, and prayed leave to correct her libel, but the judge refused to receive them and rejected her prayer. She appealed from this decision to the Court of Arches, which pronounced in favour of the appeal, reversed the decree, retained the principal cause, directed a monition for the transmission of the original libel, and gave Mrs. Smyth leave to correct the libel. Mr. Smyth appealed from this decree to the king in council, and his petition was referred to the judicial committee. His prayer was, that their lordships would report in favour of the appeal, that the decree appealed from might be reversed, the principal cause retained, and be dismissed from all further observance of justice therein. His wife's prayer was, that the decree might be affirmed, the principal cause retained, and that their lordships should assign to hear an admission of the libel, and exhibits &c., and that the same might be transmitted by the Consistory Court, &c. This appeal came on to be heard on the 12th February 1835, when the judicial committee reported to his majesty in favour of the appeal, that the decree appealed from ought to be reversed, the principal cause retained, and that Mr. Smyth should appear absolutely therein; and they ordered, that if his majesty should confirm their report, Mr. Smyth should appear absolutely before the surrogates of the committee on an appointed day. Mr. Smyth desired to be heard against the order of the judicial committee to appear abso-

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lutely, but they refused to hear him, and their decree was afterwards confirmed by the king.

A copy of the decree of the judicial committee has been served on Mr. *Smyth*, citing him to appear and see further proceedings.

That gentleman now applied in person for a writ of prohibition to the judicial committee. To prove that this court, as a superior court of *Westmins. Hall*, has power to grant this writ, he cited 4 *B. & Abr.* tit. *Prohibition* (A), *Grant v. Sir Charles Gould* (a). The court of delegates, though established by 25 *H. 8. c. 19. s. 4.*, to determine definitive appeals from the ecclesiastical courts, has been prohibited from proceeding beyond its jurisdiction, *Rex v. Bishop of Chester* (b). The powers of that court are transferred to the king in council by 2 & 3 *W. 4. c. 92.* which enacts by s. 3, that the judgments, orders and decrees of the privy council are to be final, and not subject to any commission of review. By 3 & 4 *W. 4. c. 41. s. 3.* appeals are to be referred by his majesty to the judicial committee of the privy council, who are to hear and report thereon to the king for his decision. The judicial committee therefore now stands in this place for the court of delegates. The jurisdiction of the superior courts is not ousted, unless by express terms (c), *Rex v. Dukes* (d), *Rex v. Hales* (e), *Hartley v. Cooke* (f). Secondly, the judicial committee have exceeded their jurisdiction by deciding on a matter *coram non judice de facto*, and ordering the appearance of the appellant, although prayed for by neither party to the appeal, that being made with respect to a different matter; namely, whether the

(a) 2 *H. Bl.* 100.

(b) *Hobart*, 15, *nomine Hutton's case*, *Moore*, 861, *S. C.*

(c) 2 *Burr.* 1040.


(d) 3 *T. R.* 542.

(e) 5 *T. R.* 668.

(f) *Id.* p. 542; and see *Tyrwhitt's note* to 1 *Burn's Ecclesiastical Law*, Preface, xl.

decree of the court of arches was right. The judicial committee, consequently, ought to have simply determined that point, and, having done so, was *functus officio*, without power to make any further order. In *Wood's Inst.* b. 4. c. 1. it is laid down, "If the Court of Delegates revoke a will they cannot grant letters of administration, for their power is to hear and determine the appeal." Besides, the committee has decreed upon a subject *coram non judice de jure*. The question as to the defendant's appearing absolutely was determined in his favour by the consistory court, from whose decision there was no appeal unless within fifteen days after the sentence, as required by 24 H. 8. c. 12; for by 3 & 4 W. 4. c. 41. s. 20., appeals must be brought within the times previously prescribed. No court can therefore re-consider that question; the plaintiff's right to appeal was clearly barred. This is not a judgment open to a writ of error, but an extra-judicial decree only to be impugned in this mode.

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LORD ABINGER C. B.—Although *ex officio* a member of the judicial committee of the privy council, I have never been summoned, and therefore do not hesitate to deliver my judgment upon the present case. I give no opinion upon the question, whether this court and the court of Common Pleas have power to grant prohibitions (a): for assuming that this court possesses such a power, it does not appear to me that any case has been made out which calls upon us to interfere. It is alleged that the judicial committee have come to a wrong decision upon a matter in which they have jurisdiction, for it is a mistake to say they have none. They have power to remove the suit into their own court, to take cognizance of it, and to make decrees and

(a) See *Snames v. Rawlings*, ante, 46.



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orders respecting it, in the same manner as the court of delegates might have done. That being so, if they have fallen into any error, whether in some interlocutory matter, or in their final judgment, we cannot remedy it, or entertain an appeal from their decision. It seems not altogether consistent with the principles of our law to give to any new court an original jurisdiction, without a power existing somewhere to reverse its judgment. We, however, cannot afford any redress, for if there be any mistake in the proceedings of the judicial committee, it is in a point of practice, which cannot be the ground of a prohibition, though it is sometimes that of a writ of error: now this court has no jurisdiction in error.

PARKE B.—I am also a member of the judicial committee of the privy council, but as I was not present and took no part in this cause, I have no hesitation in expressing my opinion. I concur in my lord chief baron's view of the case. Conceding that this court has power to issue prohibitions in cases where inferior courts exceed their jurisdiction, and that a party is of right entitled to the writ, without the exercise of our discretion; the judicial committee had jurisdiction in this case, which is all that we are bound to watch over with respect to inferior courts. It is a fallacy to assume that the act complained of was an adjudication on the prior proceedings upon appeal, for it was a distinct step taken in the cause after it had been removed. When the appeal was lodged the committee had the power of retaining or remitting the suit. They retained it, and ordered the court below to transmit the proceedings into their court. Having, by virtue of the removal, obtained what may be termed in this respect, an original jurisdiction, they make an order for Mr. Smyth to appear absolutely. I give no opinion upon

that order, but, whether right or wrong, it was a step taken in the cause by a court having competent jurisdiction. If the law had allowed of an appeal, the act complained of might or might not have been matter for one; but as it does not, there is no remedy for the decision, if it were wrong, which I do not think it was.

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ALDERSON B.—I am of the same opinion. It seems to me, that the matter was brought before the judicial committee by both parties. Mr. *Smyth* prayed that they would retain the cause, and dismiss him from further observance of justice therein; Mrs. *Smyth* also prayed them to retain the suit. Both, therefore, referred the cause to the decision of the judicial committee, who have incidentally taken a step in the course of the proceedings. If they have done wrong it is in a matter over which they had jurisdiction, and which regards the practice of their own court, and which cannot, therefore, be the subject of a prohibition.

GURNEY B. concurred.

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WESTMORELAND *against* PIKE.

WATSON had obtained a rule nisi on the part of the defendant, to postpone the trial in this action on account of the absence of two material witnesses.

The court will not allow a party to show cause against a rule nisi, unless he has obtained office copies of the affidavits on which it was

*Knowles* now showed cause, and stated that the rule having been moved for late in the preceding day,

obtained, or at least given an undertaking that they shall be procured; for the fees payable in respect of them are now public property.

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the plaintiff had not been able to procure office copies of the affidavits.

LORD ABINGER C. B.--You cannot proceed without such office copies, for the fees payable in respect of them are public property, and form part of the revenue of the officers, therefore, cannot give them up. To allow the case to go on your client must undertake to obtain copies of the affidavits. We came to a similar decision yesterday, in the case of *Soames v. Williams (a)*.

The plaintiff having undertaken to procure office copies, the rule was subsequently discharged upon terms.

(a) Reported on another point, *ante*, 46.

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LENEHAM *against* GOOLD.

A defendant was arrested in *London* on a bill of exchange, accepted a notice to plead in four days, but was in *Ireland* at the time that eight days' notice of trial was given to his attorney in *London*. After verdict against him in

**R**ULE to set aside the verdict for the plaintiff to have a new trial, on the ground that the defendant's "residence was and has been for some time in *Cork*," so that he should have had fourteen instead of eight days' notice of trial. The defendant had been arrested in *London* in an action against him as acceptor of a bill. Four days' time to plead was given without objection, the defendant being in *London* then. That he had not accepted. His handwriting was submitted by his attorney in the usual way. When

*London*, the defendant obtained a rule nisi for a new trial, on the ground that his residence was then and had been, for some time past, in *Cork*, and therefore he was entitled to fourteen days' notice of trial. On showing cause, the court discharged the rule, the affidavit on which it was granted not stating where the defendant generally lived, or that he was temporarily and not permanently resident in *London* at the time of the arrest.

of trial was given, the defendant's attorney said it was irregular, but did not say the defendant was or resided in *Ireland*, and he was sworn to have been in *London* from *June* to *September*. It was stated, that the affidavit in support of the rule was sworn by the defendant's bail, the reason assigned being, that, owing to the defendant's absence in *Ireland*, it could not have been sworn by him in term.

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*Per Curiam (a).*—The defendant himself or his attorney should have made an affidavit, and of a more satisfactory kind. Before making this rule absolute we ought to be satisfied that the defendant is permanently resident in *Ireland*. Consistently with what is sworn he may return to-morrow to *London*. Nothing shows that the defendant, while resident in *London*, was temporarily and not permanently resident there.

Rule discharged.

(a) Lord Abinger C. B., Parke, Alderson, Gurney Bs.

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### EDWARDS *against* DANKS.

IN an action on a bail-bond, a rule was granted to set aside the service of the writ of summons and subsequent proceedings for irregularity, on the ground that there was no default in the original action. After cause shown, the court (b) discharged the rule with costs, for the mistake not being in the service, but in suing out

Where proceedings on a bail-bond are taken before default in the first action, the court cannot set aside the service of the writ, the defect being in suing out the writ.

(b) Lord Abinger C. B., Parke, Alderson, and Gurney Bs.

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the writ itself, was the subject of a plea in bar to action.

*Steer for, Mansel against the rule.*

WARNE *against* BERESFORD.

A defective plea being delivered, judgment was signed for want of a plea after the time for pleading was out, and before the delivery of a good plea. A rule to plead had been given ascribing a wrong name to the plaintiff. The court treated the case as if no rule to plead had been given, and held the judgment irregular.

DEBT. Rule to set aside a judgment signed for want of a plea, and the execution thereon for irregularity, the words "never was indebted" being omitted from an intended plea of *nunquam indebitatus*.

For the plaintiff, the judgment was supported on the ground that no rule to plead could be found on search, and that judgment had been signed after the time for pleading was out, and before a good plea had been delivered. *Lockhart v. Mackreth* (a) and *Brandon Payne* (b) were cited. The rule to plead was in the wrong plaintiff's name.

*Per Curiam* (c).—In *Macher v. Billing* (d) a defendant who had obtained time to plead, and afterwards an order for particulars of plaintiff's demand, delivered a plea not signed by counsel, though concluding with verification, three days before the time for pleading expired. The plaintiff treated the plea as a nullity, and signed judgment the day before that on which the time for pleading expired; and after entertaining some doubt, we conferred with the officers of this court and of the King's Bench, who certified to us, that by the practice the judgment was prematurely signed, and


(a) 5 T. R. 661.

(b) 1 T. R. 689.

(c) Lord Abinger C. B. Parke, Alderson, and Gurney Bts.

(d) 4 Tyr. R. 812.

defendant having all the last day for delivering a plea signed by counsel. We thought the defendant could not be presumed to have waived the remainder of his time for pleading, in order to enable the plaintiff to sign judgment. The principle of that case applies. The plaintiff has treated the plea as a nullity. Had there been no plea, the judgment would have been irregular for want of a rule to plead, and we think it irregular now, for the rule to plead being in the name of a wrong plaintiff amounted to nothing.

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 WARNE  
 v.  
 BERESFORD.

Rule absolute.

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SHORT *against* WILLIAMS.

THE defendant had been a prisoner in execution for twelve calendar months for a debt not exceeding 20*l.*; but being in custody of the marshal under 48 G. 3. c. 123., and not of the warden of the *Fleet*, the court, on the last day of term, refused to discharge him, he not having annexed to his affidavit a certified copy of the causes in which he was in custody of the marshal, verified by affidavit; and refused to hear the motion at chambers, saying it could only be heard in term. *Mansel* for the defendant.

A debtor who has been in execution for a year for less than 20*l.* cannot be discharged from foreign custody, under 48 G. 3. c. 123., without annexing to his affidavit a copy of the causes in which he is in custody, verified by the proper officer.

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1835.

  
MEMORANDA.

## MEMORANDA.

**I**N the early part of this term, the Right Honourable Sir *Charles Christopher Pepys* Knt., Master of the Rolls, and one of the Lords Commissioners of the Great Seal, was appointed Lord High Chancellor. He was also elevated to the peerage, by the name, style, and title of Baron *Cottenham*, of *Cottenham* in the county of *Cambridge*.

At the same time, *Henry Bickersteth* Esq., one of Her Majesty's counsel, was appointed to succeed Sir C. *Pepys* as Master of the Rolls, and was created a peer by the name, style, and title of Baron *Langdale*, *Langdale*, in the county of *Westmorland*.

END OF MICHAELMAS TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

**Hilary Term,**

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

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REGULÆ GENERALES.

*Hilary Term, 6 Will. IV.*

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THE EXAMINATION OF ATTORNEYS, AND RE-  
ADMISSION OF ATTORNEYS.

1836.

I. **W**HEREAS by the statute 4 *H.* 4. c. 18, it was enacted,  
“ That all the attornies shall be examined by the  
justices, and by their discretions their names put on the roll;  
and they that be good and vertuous and of good fame, shall be  
received and sworn well and truly to serve in their offices :”  
And whereas, by the statute 3 *James* 1. c. 7. s. 2. it was enacted,  
“ That none shall from henceforth be admitted attorneys in any  
of the King’s Courts of Record, but such as have been brought  
up in the same Courts, or otherwise well practised in soli-  
citing of causes, and have been found, by their dealings, to  
be skilful and of honest disposition, and that none be suffered



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to solicit any cause or causes in any of the Courts aforesaid but only such as are known to be men of sufficient and honest disposition." And whereas, by a rule made in *Michaelmas* term, 1654, in the Courts of King's Bench and Common Pleas, it was ordered, "That the Courts should once in every year, in *Michaelmas* term, nominate twelve or more able and credible practisers, to continue for the ensuing year, to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and being approved, to be presented to the Court and sworn." And whereas by the statute 2 G. 2. c. 23. s. 2. it was enacted, "That the Judges, or any one or more of them, should, and they were thereby authorized and required before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney; and if such Judge or Judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively should, and they were thereby authorized to administer to such person the oath thereafter directed to be taken by attorneys, and after such oath taken, to cause him to be admitted an attorney of such Court respectively:" And whereas, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges, in manner hereinafter mentioned.

It is ordered, that the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, or Exchequer, respectively, together with twelve attorneys or solicitors, be appointed, by a rule of Court in *Easter* term in every year, to be examiners for one year, and five of whom (one whereof to be one of the said Masters or Prothonotaries,) shall be competent to conduct the examination; and that from and after the last day of next *Easter* term, subject to such appeal as hereafter mentioned, n

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person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

II. It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

III. And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition, in writing, to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeant's Inn Hall, by not less than three of the judges.

IV. And whereas the hall or building of the Incorporated Law Society of the United Kingdom, in *Chancery Lane*, will be a fit and convenient place for holding the said examination, and the said Society have consented to allow the same to be used for that purpose: It is further ordered, that, until further order, such examinations be there held, on such days (being within the last ten days of every term) as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the Secretary of the said Society, at their said hall; which notice shall also state his place or places of residence or service for the last preceding twelve months; and in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

V. And it is further ordered, that three days, at the least,

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before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts, as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the Master or Prothonotary, as the case may be, shall reduce all such notices, as in this rule first mentioned, into an alphabetical table or tables under convenient heads, and affix the same, on the first day of term, in some conspicuous place within or near to, and on the outside of, each Court.

VI. And whereas it is expedient, that upon the re-admission of attorneys, the Judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance: It is further ordered, that at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the Master or Prothonotary, as the case may be, which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of King's Bench, and the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

(Signed by the fifteen Judges.)

1836.  
HOLIDAYS AT THE LAW OFFICES.  

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**W**HEREAS, by the act of the 3 & 4 *Will.* 4. c. 42. s. 43., it is enacted, that none of the several days mentioned in the statute passed in the sessions of Parliament holden in the 5th and 6th year of the reign of King *Edward* the Sixth, intitled, "An Act for keeping Holidays and Fasting Days," shall be observed or kept in the courts of common law, or in the several offices belonging thereto, except *Sundays*, the day of the Nativity of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week: It is hereby ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said courts; viz. *Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of term, but not otherwise:—the birth-day of our lord the King, the birth-day of our lady the Queen, the day of the Accession of our lord the King, *Whit Monday* and *Whit Tuesday*.

(Signed by the fifteen Judges.)

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1836.

CHESLYN *against* PEARCE.

Countermand of notice of trial may be given either by the attorney in the country or by his agent in town, who is the attorney upon the record.

**G.** *T. WHITE* had obtained a rule calling upon the plaintiff to show cause why he should pay the defendant the costs of the day for not proceeding to trial at the last *Leicestershire* assizes. An affidavit of the defendant's attorney, on which rule was granted, stated that he had received no countermand of the notice of trial, except a notice reporting to be a countermand from a Mr. *Beau Brock*, who signed himself the plaintiff's attorney, that the latter was not the attorney on the record, that a Mr. *Joseph Cragg* was, and that no summons had been obtained to change such attorney. On showing cause, an affidavit was produced from *Cragg*, who swore that he was the *London* agent for Mr. *Brock*, for whom he had issued the writ and taken the other steps in the action.

*Barstow* showed cause. The question in this is, whether a countermand of notice of trial may be given by the attorney in the country; and it is admitted that such a countermand is perfectly regular. The recent rules of court clearly recognize both the attorney on the record and the attorney in the country, for by the rules of *Hilary* term 2 *W.* 4. rule 6., it is provided, that "where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received." This rule shows that the courts so far recognize notice of the attorney in the country that they will allow any affidavit in the cause to be sworn before him. Also, by the 57th rule of the same term, which declares that a countermand of notice of trial may be given either in town or country, unless otherwise ordered.

**the** court or a judge, it is implied that such countermand may proceed either from the attorney in the country or from his agent in town, whose name is on **the** record. In *Dennett v. Pass* (a), where in a country **cause** costs had been ordered to be paid to the party **or** his attorney, it was held, that a demand by the **attorney** in the country was sufficient to found an **attachment** upon for non-payment, although the agent in **London** was the attorney on the record.

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CHESLYN  
v.  
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*G. T. White* contra. The term attorney strictly means the attorney on the record. In *Tidd's Forms, Appendix, Chapter 34.*, the second section, relating to notices of trial, mentions three parties by whom they may be given, namely, the plaintiff's attorney, agent, or (under the old practice) clerk in court. Though an agent is competent to give a notice of trial or a countermand, he must give it in his character of agent; and if he gives it as the attorney, the other side is entitled to treat it as a nullity. Here, in strict practice, there is nothing to show that Mr. Brock was attorney for the plaintiff in this action, and if he sent a countermand at all, it should have been as agent to the attorney on the record.

**PARKE B.**—The 57th rule of *Hilary* term 2 *W. 4.*, providing that notice of trial shall be given in town, but that countermand of notice of trial may be given either in town or country, implies that such countermand may proceed either from the attorney in the country or from his agent in town, who is the attorney on the record. In this case the defendant's attorney knew perfectly well that the countermand came from the plaintiff's attorney, and the character in which it was given.

The other Barons concurred.

Rule discharged.

(a) 1 Scott, 586.

common person, which he has a right to do.] There are some items for attending the assizes in the country, to which the defendant cannot be entitled, as he attended the assizes himself. [*Parke B.* The officer says that makes no difference.]

1836.

JARVIS  
v.  
DEWES.

LORD ABINGER C. B.—The other party does not pay more; why should he save any thing by proceeding against an attorney? Nothing is paid to this defendant but taxed costs, which the plaintiff would have had to pay if he had brought his action against any other person.

PARKE B.—The officer certifies that it is customary to allow an attorney the same costs as if he were employed for another individual. Supposing that the defendant had defended upon the record in person, the master says that he still would have allowed all the proceedings at the assizes.

BOLLAND and GURNEY Bs. concurred.

Rule discharged.

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RICHMOND *against* BOWDIDGE, in re HIGGINS.

THE court had granted a rule in last *Michaelmas* term, calling upon an attorney of the name of *Higgins* to pay over a sum of money, which he had received in his professional capacity for the plaintiff day, unless in the meantime he showed cause before a judge at chambers. He was served with a summons to show cause accordingly, but did not appear, and also failed to keep several appointments made with him for payment of the money. On a motion for an attachment against him, the court refused to make the rule absolute in the first instance, but granted a rule nisi only.

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upon the 7th of *December*, unless he showed cause in the meantime before a judge at chambers. *Higgins* was served with notice of a summons to attend before a judge at chambers, for the purpose of showing cause accordingly, but did not appear, and he failed to keep several appointments that were afterwards made with him for the payment of the money.

*Cripps* now moved for an attachment against him for non-payment of the money, pursuant to the order of the court, and cited *The King v. Price* (a) as an authority that the rule should be absolute in the first instance.

PARKE B.—It must be a rule nisi, for the practice is never to grant a rule absolute, except for non-payment of costs under the master's allocatur. In *The King v. Price* there were special circumstances which distinguish it from the present case, and there is also this difference, that here the rule was referred to a judge at chambers, but there it was made absolute by the whole court. That decision is a solitary exception to the general rule, and we think that we ought not further to extend the exception.

*Per Curiam*.—(PARKE, BOLLAND, ALDERSON, and GURNEY Bs.)

Rule nisi only.

(a) 1 Price, 341.

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PARKER *against* DUBOIS.

**A**SSUMPSIT for money paid to the use of the defendant, and upon an account stated. Plea: the general issue. At the trial before Lord Abinger C. B. at the *London* sittings after last *Michaelmas* term, it appeared that this action was brought to recover the sum of 20*l.*, alleged to have been paid by the plaintiff for the defendant's use, being a call of 1*l.* per share upon 20 shares in the *Cata Branca* Mine, belonging to the *Brazilian Mining Company*. The shares in respect of which the 20*l.* was paid had been sold by the plaintiff to the defendant in *June* 1834. On the 2d *July* following the defendant paid a Mr. *Hill*, with whom the shares had been deposited by the plaintiff, a small portion of the purchase money, but he subsequently refused to complete his contract. The plaintiff having brought an action to enforce the agreement, while such action was pending, his attorney addressed the following letter to the attorney for the defendant.

" PARKER v. DUBOIS.

" SIR,

" I beg to acquaint you, that notice has been given of a call of 1*l.* per share having been resolved on by the *Brazilian Company*, and I have to request the favour of your informing me whether the defendant is desirous of avoiding a forfeiture of the shares agreed to be purchased by him, by authorizing my client to pay the amount required.

" I am, &c.,

" J. Pasmore Esq."

" J. B. HUDSON."

To this letter the defendant's attorney returned the following answer.

An action was brought to enforce a contract for the purchase of certain shares in a mining company, and while such action was pending, the attorney for the plaintiff wrote to the defendant's attorney to inform him that a call had been made upon the shares, and requesting to know whether the defendant would authorize the plaintiff to pay the amount required, to avoid a forfeiture of the shares. The defendant's attorney wrote back authorizing the plaintiff to do so: Held, that these letters did not require an agreement stamp, pursuant to 55 G. 3. c. 184.

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" PARKER v. DUBOIS.

" SIR,

" *Basinghall Street, 28th February 183* =

" As it is the intention of my client to redeem the *Cata Br*—  
shares, your client is hereby authorized to pay the call of 1l.  
share.

" I am, &amp;c.,

" *J. B. Hudson Esq.*"" *J. PASMO* =

It was objected by the defendant's counsel, that the letters being tendered in evidence on the part of the plaintiff, should have had an agreement stamp; but the objection was overruled by the lord chief baron and the case went to the jury, who found a verdict for the plaintiff.

*Erle* now moved for a new trial, on the ground that the letters should have been stamped as an agreement. He contended that it was the same thing as if an express contract had been entered into between the parties for the payment of the call upon the shares; and cited *Smith v. Cator* (a), and *Bohen v. Fox* (b).

LORD ABINGER C. B.—These letters do not amount to a contract, although they are the foundation for an implied contract, when the money shall have been paid. Suppose that I write to my banker to pay money for me and he does so, and brings an action for money paid to my use, does my letter amount to an agreement? The letter of the defendant's attorney is a mere direction to pay money.

PARKE B.—That letter is clearly not an agreement. In *Penniford v. Hamilton* (c), which approaches nearest to the present case, it was held that a proposal or estimate to do certain work did not require a stamp.

GURNEY B. concurred.

Rule refused.

(a) 2 B. &amp; Ald. 778.

(b) 2 M. &amp; R. 167.

(c) 2 Stark. N. P. 475.

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GUNTER *against* MACTEAR and Others.

**C**OWLING had obtained a rule calling upon the plaintiff to show cause why a commission should not issue to examine witnesses in *Jamaica*. The action was brought for a breach of an agreement, whereby the defendants had engaged the plaintiff to sail as supercargo in a ship that they were sending out to *Canton*, in order to form a commercial establishment there. To the declaration the defendants pleaded, first, the general issue; and, secondly, that the plaintiff had been guilty of immoral, corrupt, and improper conduct, which rendered him unfit for the employment mentioned in the declaration, and which did not come to the ears of the defendants till after the making of the agreement, to wit, on &c., when they discharged the plaintiff from further employment under the agreement. The replication took issue upon this plea. The affidavit on which the rule had been obtained, after stating that the deponent had received information that the plaintiff had been guilty of criminal conversation some years before in the island of *Jamaica*, alleged "that the issue to be tried between the said plaintiff and the defendants, under the pleadings in this action, will be, whether or not the said plaintiff was guilty of such immoral and improper conduct as aforesaid; and that several persons, now residing in the said island, but whose names are at present unknown to this deponent, are cognizant of the facts before stated." The affidavit then averred, in the usual form, that the parties were material witnesses, and that they would not be in *England* before the trial.

A rule nisi was obtained for a commission to examine witnesses in *Jamaica*, founded upon an affidavit, stating that there were several persons residing in that island, but whose names were unknown to the deponent, who were cognizant of the facts on which the issue was raised. The court discharged the rule, on the ground that the affidavit must either specify the witnesses by name, or otherwise describe them.

*Butt*, on showing cause, was stopped by the court.

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after the making the said indenture, and during the continuance of the said copartnership, suffer or permit the said joint trade or business to be carried on at or in the said house and premises, situate and being No. 97, *New Bond Street* aforesaid, according to the form and effect of the said indenture, but wholly refused and neglected so to do, and, on the contrary thereof, he the defendant, after &c., to wit, on &c.; and although the plaintiff and defendant had not mutually agreed or decided on carrying on the said trade or business at or in any other house or warehouse, wrongfully and improperly closed and wholly shut up the said house and premises in *New Bond Street* aforesaid, and hindered and prevented the plaintiff and all the then joint customers of the said joint trade and business from having any access thereto, and from procuring any medicines, drugs, and chemicals therefrom, as they otherwise might and would have done, and kept and continued the said house and premises so closed and shut up without the license or consent, and against the will of the plaintiff, for a long space of time, to wit, for the space of three days then next following, and thereby for and during all that time wholly hindered, obstructed, and prevented any trade or business whatever from being done by or for or on account of the copartnership trade or business, and by reason thereof divers great gains and profits, which might and would otherwise have arisen and accrued to the said copartnership, became and where wholly lost to the same, and the said copartnership trade and business became and was permanently injured and rendered of little or no value, and hath so continued from the determination of the said copartnership, and still doth continue hitherto, contrary to the tenor, &c.

Demurrer, assigning for causes that it is not stated in, nor does it appear from the said supposed breach, that

they were improperly shut up, it should appear that they were closed at unseasonable times. [Lord Abinger C. B. Is not the hindering of the customers a breach of the agreement? Parke B. There is nothing in the objection.]

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*Per Curiam*—(Lord ABINGER C. B., PARKE, BOL-  
LAND, and GURNEY Bs.)

### Judgment for the plaintiff.

#### The DUKE OF NORFOLK *against* LEICESTER.

**TREMENHERE** moved for a *scire facias* to revive a judgment more than ten years old, upon an affidavit of the existence of the debt by the plaintiff's attorney; who swore he "was and is" such attorney, but did not state how long he had been so.

PARKE B.—If you have not an affidavit by the plaintiff, you ought to have one from the person who was his attorney when the judgment was obtained.

The defect in the affidavit was subsequently supplied, by the agent in *London* swearing that the plaintiff's attorney was his attorney at the time of the judgment.

is the plaintiff's attorney, was held insufficient; but the defect was subsequently allowed to be supplied by the agent in *London* swearing that the attorney was the plaintiff's attorney at the time of the judgment.

The affidavit of the existence of the debt required to obtain a *scire facias* to revive a judgment more than ten years old, ought, if not made by the plaintiff, to be made by the person who was his attorney when the judgment was obtained. An affidavit, which merely stated that the deponent was and

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the defendant had notice of any and what incumbrances thereon; and defendant was then informed by *J. H.*, plaintiff's agent, of the application of Lord *E. T.* to the plaintiff for such advance as aforesaid, and that Lord *E. T.* had proposed to grant him such annuity as aforesaid, to be secured as aforesaid; and defendant was then interrogated by said *J. H.*, on the part and behalf of plaintiff, respecting the said life interest of the said Lord *E. T.* in the dividends, interest, and annual income of the aforesaid trust-fund, and whether the same had been or was in anywise incumbered or affected by any then existing security or not; and whether the same were then a good and sufficient security for the due payment to him, the plaintiff, of such annuity as aforesaid; nevertheless, the defendant well knowing all and singular the premises aforesaid, and that the said life interest of the said Lord *E. T.* in the dividends, interest, and annual income of the aforesaid trust-funds, had been and then was so greatly incumbered and charged that the said life interest of the said Lord *E. T.* in the said dividends, &c. of the trust-funds aforesaid was not and could not be a good and sufficient security for the payment to the plaintiff of such an annuity as aforesaid; and that, on the contrary, the same could not afford any security whatsoever, but contriving &c. to deceive the plaintiff, falsely, fraudulently, and deceitfully represented and asserted to said *J. H.*, so being such attorney and agent of the plaintiff as aforesaid, that said Lord *E. T.* had in the year 1833 granted six annuities to several individuals for considerations, in the whole amounting to about 16,000*l.*; that of those the Marquis of *Bath* had paid off three, being as nearly as possible one half, absolutely, and which were discharged in the insolvent office in the usual manner; that *W. Mellish* had taken assignments of the other three, and there-

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fore they existed in as full force as ever, but that, subject to these three annuities, he, the defendant, then most positively asserted and affirmed that he had had no notice of any other charge whatever; by means and in consequence of which said representation the plaintiff not knowing to the contrary, but believing thereupon that the said life interest of said Lord *E. T.* in the dividends, interest, and annual income of the aforesaid trust-fund, was not incumbered or affected by any other then existing security than the said three annuities so assigned to said *W. Mellish* as aforesaid, and that the said life interest of said Lord *E. T.* was then a good and sufficient security for the due payment to him, the plaintiff, of such an annuity as first aforesaid; and the plaintiff being thus deceived by the representations and assertions of the defendant, so by him made as aforesaid, was thereby induced to and did afterwards, (to wit,) on 12th *March* 1834 aforesaid, advance to said Lord *E. T.* 999*l.*, and purchased of him such annuity as aforesaid; and he Lord *E. T.* did then, upon the day and year last aforesaid, by a certain indenture made between him, of the first part, the plaintiff of the second part, and said *J. H.* of the third part, for and in consideration of that sum then paid by the plaintiff to said Lord *E. T.* as in the said indenture mentioned, did grant, bargain, sell, and confirm unto plaintiff, his executors, administrators, and assigns, one annuity or clear yearly sum of 120*l.* of lawful money of *Great Britain*, to be paid and payable for and during the natural life of Lord *E. T.* The declaration, after stating Lord *E. T.*'s covenant, bond, and warrant of attorney, and his assignment of his interest in the above dividends, for securing the annuity, averred, that at the time the defendant so represented and asserted as aforesaid Lord *E. T.* had, for securing the Marquis of *Bath* a sum of 20,000*l.* lent by the marquis

to pay off his, Lord *E. T.*'s simple contract debts, and repurchase the then annuities so represented by the defendant to have been paid off by the marquis, by indenture, dated 7 *August* 1833, transferred and set over to the marquis, his executors, &c. the interest, dividends, and annual produce due and to grow due for or in respect of the said trust-funds, subject to the same three annuities mentioned. Averments, that the defendant had notice of the assignment to the marquis, and the charge thereby created on Lord *E. T.*'s life interest; that it was not, at the time of making such assertion and representation of the defendant as aforesaid, a good and sufficient security, or any security whatever, for the due payment to the plaintiff of the said annuity so granted to him by Lord *E. T.*, as defendant then also well knew, and that Lord *E. T.* did not pay the annuity, and being still living and in bad and indigent circumstances, the plaintiff is likely to lose it and all future payments on account of it, and the means of obtaining payment thereof, as he might and would have done if the life interest of Lord *E. T.* had not been so assigned to the said marquis, and incumbered or charged beyond the three several annuities which the defendant so falsely and fraudulently asserted and represented to be the only incumbrance affecting the same as aforesaid; and also by means of the premises the plaintiff hath been put to great charges and expense of his monies, in the whole amounting to 300*l.*, in and about the procuring and obtaining the grant of said annuity by said Lord *E. T.* to the plaintiff as aforesaid, and in and about the preparing and executing such indenture for securing the payment thereof as aforesaid, and in and about other the premises aforesaid, and was and is thereby and otherwise greatly injured.

Pleas: 1st. not guilty: 2nd. That said plaintiff was

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not, by the said supposed representations and assertions of the said defendant in the said declaration ~~in~~ that behalf mentioned, induced to advance, nor did ~~he~~ the said plaintiff, in consequence thereof, advance to the said Lord *E. T.* the said sum of 999*l.* in the said declaration mentioned, or any part thereof, or purchase of the said Lord *E. T.* said annuities therein mentioned, in manner and form as in that behalf alleged. At the *Middlesex* sittings after last *Trinity* term, before Lord *Abinger* C. B. the representation by the defendant appearing to have been oral, the plaintiff was nonsuited (a).

A rule to set aside the nonsuit having been obtained, Sir *William Follett* and *Channell* showed cause in *Michaelmas* term. *Bompas* Serjt. and *Erle*, in the same term, supported the rule, citing *Foster v. Charles* (b), decided before 9 G. 4. c. 14., and *Polhill v. Walter* (c) since it passed. The court took time to consider their decision, and, not agreeing in opinion, the learned barons in this term delivered their judgments *seriatim*. It would be superfluous to repeat the facts and arguments.

GURNEY B.—This action is brought upon an alleged false representation of the defendant, that the marriage settlement of Lord *E. T.* was charged with only three annuities; whereas it was charged, in addition, with a mortgage of 20,000*l.* to the Marquis of *Bath*, which the defendant knew; by this representation it is alleged that the plaintiff was induced to advance a sum

(a) Lord *Abinger* observed on that occasion, that as the act was not limited to persons in trade, the word *ability* was sufficient to embrace the case. The object of the application to the defendant was merely to know whether Lord *E. T.* had ability to repay the money which the plaintiff proposed to lend him. The statute equally applied whether the representation of ability was general or particular; *e. g.* it would be the same if, in answer to a general question, the defendant had said that Lord *E. T.*'s circumstances were good; or to a particular question, as, whether he had a particular estate named, which he could mortgage, the answer had been that he had.

(b) 3 B. & Adol. 114.

(c) 6 Bing. 396; 7 Id. 105.

of money for the purchase of an annuity from Lord *E. T.*, secured by his covenant, bond, and warrant of attorney, and also by an assignment of his interest in the dividends of the stock in which the portions forming the subject of the marriage settlement were invested, amounting altogether to 433*l.* 6*s.* 8*d.*

It appeared at the trial, that the representation (if ever made at all) was, at all events, made by parol; whereupon the lord chief baron on that ground directed a nonsuit.

The question in this cause arises upon the 9 *G.* 4. c. 14. s. 6., which appears to have been enacted for the purpose of extending the operation of section 4 of the statute of frauds, 29 *C.* 2. c. 3., which enacts that no action shall be brought to charge another upon any special promise to answer for the debt or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged, or by some other person thereunto by him lawfully authorized. This protected a person who was called upon to answer for the debt or miscarriage of another, unless he had made himself responsible in writing.

But a series of cases, commencing with the case of *Parley v. Freeman* (a), had occurred, in which defendants were charged, not strictly and specifically, as guarantees for the solvency of others, but on alleged representations and assurances respecting them and their credit or ability alleged to be false and fraudulent. There is no doubt but there have been many cases in which false and fraudulent representations of the ability of others have been made, in order to obtain credit for them, by which honest men have suffered; on the other hand, there has been but too much reason to fear that innocent persons have been

(a) 3 *T. R.* 51.

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victims not only of intentionally false but intentional exaggerated statements of conversations. If inquiries were made, and information given, respecting the credit or ability of the person whom the inquirer was called upon to trust, either with money or with goods, inquiry would be private, the communication would be private, and, if the inquirer was a competent witness on his evidence alone, without the possibility of contradiction or explanation, the case must rest.

It had been a subject of complaint that these cases had trespassed upon the security intended to be afforded by the statute of frauds; and it was considered by the legislature, that a person so circumstanced was entitled to the same protection as the statute of frauds had given to the person whom a plaintiff sought to charge for the debt or miscarriage of another. To afford this protection, among other purposes, the statute 9 G. 4. c. 14., was passed. That act is intitled, "An Act for rendering a written instrument necessary to the validity of certain promises and engagements." The sixth section enacts, "That no action shall be brought to charge any person, upon or by reason of any representation or assurance made given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon;" (which I have no doubt may be read "money or goods upon credit" unless such representation or assurance be made in writing, signed by the party to be charged therewith. By this the protection is carried even further than the statute of frauds; there the party might be charged on a writing signed by a person thereunto by the defendant lawfully authorized, which left him exposed to be charged by the verbal representation of another that he had authority to sign.

It is contended on the part of the plaintiff, that this is not an inquiry concerning or relating to the ability of *Lord Edward Thynne*, but an inquiry into a particular fact respecting part of his property, and therefore not within the statute. It is to be observed that this is not an inquiry into the value of a thing which is to be purchased, but an inquiry into a portion of the ability of the borrower, who is to give both his personal security and the pledge of a particular fund. If it concerns or relates to his ability in any respect whatever, it seems to me to come within the act. I consider it to be an inquiry into the ability of *Lord Edward Thynne* in respect of this property, the security of which, in addition to his personal liability, it was intended to take. Was *Lord Edward Thynne* able to give this security for the payment of the annuity? Had he the ability to charge this particular fund? That is, had he or not exhausted the fund? His ability is greater or smaller, according to the extent of the property he possesses, and the amount of the charges to which that property has been subjected.

If *Lord Edward Thynne* wished to obtain money from *Lyde*, he must have represented, I presume, that he had the ability to charge this particular fund with the payment of the annuity. The inquiry made of the defendant is as to *Lord Edward's* ability in that respect; the omission of the name of *Lord Edward Thynne* and his ability to charge in the form of the question, and the putting forward the fund itself as the thing respecting which the inquiry was made, does not alter the case; as the fund could not be charged but by the act of *Lord Edward Thynne*, his ability to charge it is the thing substantially inquired into. It is contended by the counsel for the plaintiff, that this applies to the cases where the personal security only of the borrower or customer is the subject of the inquiry, and that that appears from the words

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of the statute. There is no doubt that that is the principal object, because the cases which occur are mostly cases of that description ; but I find nothing in the act to limit it to cases of personal responsibility. The words are general. I think that the conclusion at which I have arrived is supported by the express words of the statute, and is conformable to its intention. The construction which I have put upon the statute imposes no hardship on the party lending or trusting ; he who has money to lend, or goods to sell on credit, and doubts the ability of the borrower or buyer, may exact his own terms ; he may insist on having a representation or assurance in writing of the ability from a third person, and if that be refused he may keep his money or his goods. If he thinks proper to trust without that, think he has no right to resort to the responsibility of the person of whom he inquires. A different construction would abridge the security which it was the object of this act to confer upon the persons whom inquiries are made, and would, I fear, lead to the same consequences as the cases that I have mentioned produced with respect to the statute of frauds until the legislature found it necessary to interfere. I think, therefore, that this rule for setting aside the nonsuit should be discharged.

ALDERSON B.—I regret that the difference of opinion existing in this case makes it necessary for me to pronounce the reasons for the judgment I have formed upon it. The question raised in it depends on the construction to be put by the court on the sixth section of Lord *Tenterden's* act, 9 G. 4. c. 14. That section provides “ that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the

intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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Now the facts of the case seem to me to be in substance these:—The plaintiff *Lyde* was about to advance a sum of money to Lord *Edward Thynne* on the purchase of an annuity; the annuity was to be secured (in addition to his personal responsibility) by the assignment of Lord *Edward Thynne's* interest in a certain fund settled at the time of his marriage, and of which fund the defendant, with some other persons, was a trustee. This fund was charged at the time with three annuities, payable to Mr. *Mellish*; and was also liable to a mortgage of 20,000*l.* then vested in the Marquis of *Bath*. The defendant was applied to, on the part of *Lyde*, to inform him as to the existing state and charges upon this fund; and the plaintiff contends that he wilfully and fraudulently made a false representation to him of the amount of the charges upon it. For this false representation the action was brought. It appeared at the trial that the representation (if ever made at all) was, at all events, made by parol; whereupon the Lord Chief Baron on that ground directed a nonsuit. According to the view I take of the case, I think the nonsuit was wrong, and that the facts ought to go to the jury. The question was, whether this was a representation concerning or relating to the ability of Lord *Edward Thynne* so as to fall within Lord *Tenterden's* act. If we refer to the cases which had occurred before this legislative provision, I think it will be found that the decision in that class of cases, commencing with *Pasley v. Freeman*, had raised a well-founded complaint in the profession, as having in fact virtually repealed the statute of frauds, by which a guarantee was required to be in writing; and that the object

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Lord *Tenterden* had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle ; for a guarantie increases the ability of a third person, who is about to be trusted, by adding to the value of his personal responsibility, that of the person making the guarantie and, in like manner, the false and fraudulent representation as to the third person's ability equally adds, in the opinion of the person trusting to it, to the value of the third person's responsibility ; it ought justly to have, and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantie of the third person's solvency. I think, therefore, that we should take this as the key to the true construction of Lord *Tenterden's* act ; and we do so, it seems to me to follow from it, that a representation to be within the act must be one by which the personal responsibility of the third person is increased in the judgment of the individual from whom he is about to obtain credit, money, or goods ; and that receives confirmation, I think, from the other words of the act.

The other representations are as to character, conduct, credit, trade, and dealings. All these look as if directed to general character for solvency, general conduct in conducting pecuniary affairs, general credit on the exchange, general mode of conducting trade or business. The representation may, no doubt, and most commonly will, be made as to particular incident in character, conduct, and the like ; but all these representations necessarily affect the general character, conduct, credit, trade, and dealings, &c. : consequently there can be no ambiguity or difficulty in construing the act in cases of this description. For the third

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Person's personal responsibility is necessarily involved in the result of such an inquiry, if money, goods, or credit is obtained in consequence thereof. But when we take the word "ability," (by which is of course meant pecuniary ability,) the case becomes somewhat ambiguous. For though a man's pecuniary ability depends on the whole and every part of his property, yet a representation confined wholly to a particular portion of his property in possession, remainder, or expectation, may or may not relate to his pecuniary ability, and increase the value of his personal responsibility to the person making the inquiry, according to the circumstances under which it is made. If the querist is about to trust to his intended debtor's personal responsibility, and the object of the question is to ascertain how far he will be safe in so doing, there can be no doubt that such a representation does relate to the third person's ability, and is within the act; but if he be only about to take an assignment of the property itself, and the object is to ascertain the value of that property, then it is manifest, I think, that the pecuniary ability of the person about to assign has nothing to do with it. The party making the assignment only looks to the property itself, and does not, in that case, trust the intended contractor at all. If we were to hold such a representation to be within the act, I do not see how we are to stop short of saying, that all representations relating to contracts between third persons must be in writing, if such contracts relate to the obtaining of credit, or to the obtaining of money, or even to the sale or pledge of goods.

The assignment of a mortgage, or the sale of an estate, or the sale or pledge of any goods, would be within it; and a fraudulent and false representation of the value of or charges upon the estate mortgaged, or



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sold, or the goods to be delivered or pledged, would be without danger, if by parol. Indeed the case of party lending money on mortgage, who always has double claim, first, on the property mortgaged, secondly, on the personal responsibility of the mortgagor, by express covenant, seems to me not easily distinguishable from the present. And, consequently a representation as to the value of the estate would be within the act, if this case be so. I do not say that it would not be a very good law if it were so; but I am not prepared to go so far in the construction of the act.

The concluding words of the section plainly, as seems to me, point to the same construction. The representation must be "to the intent that a third person may obtain credit, money, or goods upon;" which appears to me to show that the object of the act was confined to cases in which the third person's responsibility is trusted. According to the view which I take of the act, the representation, in order to be within it must therefore be of the third person's trust-worthiness as evidenced by his character, conduct, ability, credit, trade, or dealings; and must be one, whereby, if true, that trust-worthiness is increased. If, indeed, the real clause, as drawn by Lord *Tenterden*, stood thus,—“To the intent that such third person might obtain money or goods upon credit,” which is highly probable, this conclusion would be strengthened; but I do not rely on that which is, after all, only matter of probable conjecture, from the ungrammatical state of the sentence as it now stands.

I proceed then to apply the above principles to the present case. Here the representation to the plaintiff is one which, it is admitted, relates solely to Lord *Edmund Thynne's* property, of which the plaintiff was about to take an absolute assignment; and I think the question

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~~Put~~ had reference only to that assignment. The plaintiff did not, as it appears to me, apply to the defendant for any assurance as to Lord *Edward Thynne's* trust-worthiness: all that he wished to know was the value of a particular fund about to be absolutely assigned to him; and although the personal responsibility of Lord *Edward Thynne* was also to be taken, and, therefore, a representation as to the value of a portion of his property might, if unexplained, have reference to that also; yet I think the peculiar circumstances of this case, so far as it had gone when the nonsuit took place, negative that supposition here, and show that this representation (if made at all by the defendant) was one relating solely to the value of the property to be assigned; and having no reference at all to the trust-worthiness of Lord *Edward Thynne*, whose ability, according to the view I take of this act of parliament, would, in this, depend not upon the property assigned, but on the residue of his property alone, respecting which no inquiry was made. If, however, I am wrong in this view of the facts of the case, still I apprehend the nonsuit was wrong, and that there ought to be a new trial, in order that these facts may be submitted to the jury. For if it be doubtful whether the question was put, and the representation made, solely with reference to the value of the property to be assigned, or partly in reference to that, and partly to the personal responsibility of Lord *Edward Thynne*, still the plaintiff ought not to have been nonsuited; but that doubtful question of fact should have been left to the jury, with proper directions from the Lord Chief Baron.

The case in principle falls within the rule established in actions for a malicious prosecution, where, although the question of probable cause is for the judge, still if the facts on which that question depends are disputed, the case as to that point must go to the jury, with

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proper directions from the judge. In this case, therefore, if the facts were doubtful, it seems to me that the Lord Chief Baron should have directed the jury that if they thought this question was just, and the representation made at all with reference to the trustworthiness of Lord *Edward Thynne*, they ought at all events to find for the defendant, the representation not being in writing; but that if they thought it had reference solely to the value of the property, then they should further consider whether it had been made fraudulently by the defendant. For these reasons I think the nonsuit wrong.

PARKE B.—The facts of this case having been already stated, it is useless to repeat them; but, in order to understand the question to be decided, it is necessary to observe, that although the plaintiff intended to pay his money for the annuity, partly on the security of Lord *Edward Thynne's* interest in the settlement funds, and partly on his personal credit, the question is as to the defendant, and his representation in answer to it related to the fund only, and in no way to the personal credit of the proposed grantor; for the plaintiff's witness asked the question with a view that the plaintiff should take a transfer of all the interest of Lord *Edward*, and thus prevent it from being any longer a part of the means which constituted his personal credit. The plaintiff, in so far as he trusted to the personal credit of Lord *Edward*, looked to the other means which he might possess, and as the witness inquired as to the state of the fund only, and made no reference to Lord *Edward's* general solvency, it must be understood *primâ facie* at least, that the defendant's representation was meant by him to relate to the state of the fund only, and not to that fund as an element of his personal credit. If any doubt could exist on this question,

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should have been submitted to the jury. The case then I consider to be precisely the same as if Lord *Edward's* personal credit was in no way in question, and as if the only subject of inquiry and representation had been the state of the fund itself; or, which is the same thing, of some subject-matter, which the inquirer was about to purchase; and we are to decide whether a representation concerning and relating to the qualities of a thing only, and not to the personal credit of a third person, be within 9 G. 4. c. 14. s. 6. I am of opinion, after much consideration, that it is not. The clause is as follows. [Here the learned baron read the clause.] If we construe the first words of the clause according to their ordinary import, as we ought to do, it appears to me impossible to say, that a representation or assurance only as to the state of the property to be transferred to the inquirer, in any way concerns or relates to the "character, credit, conduct, ability, trade or dealings of a person who is to transfer." It does not concern or relate to his *character*, nor to his *credit*; it does not relate to his *conduct*, *trade*, or *dealings*; for it is wholly immaterial, with reference to the inquiry, and the answer to it, *who* had incumbered the fund, the only question in substance being, to what extent it was incumbered: and it does not relate to his *ability*, for that word, especially when we look at those which accompany it, means, in its ordinary sense, some quality belonging to the third party, and not to the thing to be transferred. In order to bring the particular case within the statute, this last word is relied upon, and it is said that the representation of the state of the fund relates to the ability of the intended grantor of the annuity, that is, to his "ability to fulfil his contract to charge the fund;" or if no contract was made at the time of the representation (as there was not), then the phrase must be

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changed, and it must be said to relate to his ability to charge the fund; but this will hardly be sufficient to answer the exigency of the case, for there is really no question as to the power of the third person to charge the fund, *such as it is*: it must therefore be said to relate to his ability to give a security on a fund of adequate value. In like manner, I presume, if a fraudulent representation were made by one person to another, about to purchase an estate from a third, as to the rent paid for it, or its quality, as, for instance, as to the existence of minerals under it, (which are cases, in my view of the subject, precisely analogous to this,) such representation would be said to concern or relate to the "ability" of the vendor, that is, to his "ability" to convey an estate, as valuable as the purchaser expected it to be, when he made his purchase. In my apprehension, this is a very forced construction of this word; and though the word is intelligible enough, when read with such contexts, I cannot help thinking that any one who found the word "ability" as it stands in this statute, would not *à priori* suppose that it could be so applied; I think, therefore, that according to the ordinary meaning of this word, this representation in no way relates to the ability of the intended grantor of the annuity. But I admit that words may be construed in a sense different from their ordinary one, when the context requires it, (which is not the case here,) or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual; for we must always construe an act so as to suppress the mischief and advance the remedy. The framer of the act has not enabled us to determine this by any recital in the section itself; and we are therefore left to infer it from our knowledge of the state of the law at the time, and of the practical grievances generally complained of. It was stated at the bar on

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both sides, and my learned brothers who have preceded me agree, that the mischief to be remedied was the evasion of the provision of the statute of frauds, that no one could be charged with the debt, fault, or miscarriage of another, unless there was a note in writing signed by the party to be charged therewith; and I concur in that opinion. Since the case of *Pasley v. Freeman*, it is well known, from some reported cases, and from others which have not found their way into the books, that a practice had grown up of fixing a person with the debt of another, by parol evidence of representation as to the solvency or trust-worthiness of a third person, and proof that credit was given on the faith of that representation. The practice did not extend to all cases within the statute of frauds. That statute applies to a guarantie, for good consideration, for a debt *already contracted*, as well as where credit was to be given; but the evil existed only in those cases in which credit was subsequently given on the faith of the representation made. In this respect the practice of bringing actions on such parol representations, was an evasion of the statute of frauds; and Lord Tenterden (who framed the act), meant, I think, to put all cases on the same footing, where one, on the personal credit of another, gave personal credit to a third; and to make it necessary that there should be a note in writing, where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mischief to be this, and no more. It may be suggested, that the legislature might have meant to put an end altogether to the liability of one person, by a fraudulent parol representation, whereby another received all the benefit gained by that representation; but if such had been the intention of the framer of the act, I should have supposed he would have so drawn it,

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as to include all cases of fraudulent representation, the intent or purpose that another might obtain credit thereby: whereas he has certainly limited the prohibition to cases of character, credit, &c.; which circumstances are those which naturally bear on the personal credit or trust-worthiness of that third person and indicate, in my mind, that the intention was to apply the enactment only to such cases wherein personal credit was intended to be given to another; and the representation relates to such personal credit, this is, to the evasion of the statute of frauds.

The words of the clause in question are, it is to be observed, clearly inaccurate; probably from a mistake of the transcriber into the parliamentary roll. We must make an alteration in order to complete the sense and must either transpose some words, and read the sentence as if it were "to the intent or purpose that some other person may obtain money or goods upon credit," or interpolate others, and read it as if it were "to the intent or purpose to obtain credit, money, and goods upon *such representation*." If we assume Lord Tenterden's object to have been merely to prevent evasions of the statute of frauds, as we think it was, and use this as a key to the construction of the clause it would induce one to prefer the former alteration by which the clause is made clearly to apply only to cases where the purpose of the representation is to obtain personal credit for the third person: but then it would not apply to *all* cases of such credit, for it would include "money and goods" only, not work and labour done for the third person, or houses or land let to be on the faith of such representation; which, however, are cases of by no means so frequent occurrence as transactions in money or goods. On the other hand, if we make the latter alteration, using the same key to the construction of the clause, we must reject the

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Words "money or goods" as surplusage, as they would be included in the general term "credit." I think it highly probable that the first correction would make the clause such as Lord *Tenterden* originally wrote it; but whichever is adopted, I am of opinion that the statute applies only to those cases in which the representation is made relating to the trust-worthiness of a third person, with the intent that he may obtain personal credit on the faith of such representation.

I do not by any means intend to say, that a representation as to the value or condition of a particular part of a man's property, may not relate to or concern his "character, credit, &c." within the meaning of these words; it would do so where the declared object of the inquirer should be to give credit to a third person upon his personal responsibility, and he is seeking information as to part of the means which constitute its value; but where the representation is made as to the state of part of the property of such third person, not as an element of trust-worthiness, but with a view that the inquirer should obtain a right to the thing itself, I am of opinion that such a representation in no way relates to or concerns the character, conduct, credit, "ability," trade, or dealings of that third person within the meaning of this act.

For these reasons, I am of opinion that the rule ought to be made absolute.

Lord ABINGER C. B.—This was a motion to set aside a nonsuit upon the statute of 9 G. 4. c. 14. s. 6. The action was brought upon an alleged false representation of the defendant, that the marriage settlement of Lord *Edward Thynne* was only charged with three specific annuities; whereas it was charged in addition with a mortgage for 20,000*l.* to his father, the Marquis of *Bath*; upon which representation the plaintiff was



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induced to advance to Lord *Edward Thynne* a sum of money upon an annuity secured by a charge upon the marriage settlement. Upon the objection urged on the trial, that the representation not being made in writing, could not by virtue of the statute be the ground of an action, the plaintiff was nonsuited; since which the question has been fully discussed upon a motion to set the nonsuit aside, and the court has taken some time to consider of the judgment which ought to be given; and I am of opinion that the rule for setting aside the nonsuit should be discharged.

The statute of 9 G. 4. c. 14., commonly called Lord *Tenterden's* Act, was introduced to supply a defect which had been found by experience to exist in the 13 Car. 2. c. 3. s. 4., the material part of which, as it applies to this case, is in these words: "That no action shall be brought whereby to charge the defendant upon any *special promise* to answer for the debt, default, or miscarriage of another person, unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorised." The obvious policy of this statute was to prevent the fraud and perjury which had been found by experience, or was thought probable to arise, from trusting to evidence of less authority than that of a written document, for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable. This statute clearly extends to promises to answer for the debt, default, or miscarriage of another, whether that debt is secured by mortgage or other specific pledge, or the default or miscarriage arises from the failure of a specific security. This statute seems to have successfully accomplished its object till a mode was discovered

evading it by shaping the demand, not upon a *special* misfeasance, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false and fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was that of *Pasley v. Freeman* (a). In that case Mr. Justice Grose differed from the other judges. He treated it as a case entirely new, for which there was no precedent, and as a means of evading the statute of 1793 so obvious, that he predicted an abundant succession of actions of the same sort, as the result of that determination. The other judges, Lord Kenyon, Mr. Justice Ashurst, and Mr. Justice Buller, admitted that there was no precedent for such an action, but that there were principles to be found in the law to support it, and Lord Kenyon in particular, with that high tone of moral feeling which ever distinguished his judgments, pronounced that the law would have been very defective if it had not given a remedy for an injury resulting from a gross breach of the plainest rules of morality. Whatever may have been the merit of this decision, it is certain that the prediction of Mr. Justice Grose has been fully accomplished. The case of *Pasley v. Freeman* has been the foundation of a numerous class of cases of the like kind, some few of which only have found their way into the printed reports, the great majority having passed without further notice after the struggle for the verdict ceased. It was to remedy the inconvenience resulting from the frequency of these decisions, that Lord Tenterden introduced the statute of G. 4. c. 16. s. 6., which is in these words. [The Lord Chief Baron here read the clause.] It has been intended that the case now before us does not fall within the proper construction of this statute, because


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it is the case of a false representation of a particular fact, and not of a representation concerning the general ability of Lord *Edward Thynne*, or made with an intention that credit, or money, or goods, should be obtained on the belief of his general ability; and that the statute ought by construction to be confined to cases where the representation concerns the general ability, where the party to whom it is made proposes only to rely on the general ability, or personal security, or promise of the person to be trusted. It is true that the question raised turns on the meaning of the word "ability" in the act. The first objection pre-supposes that the word *general* ought to be implied before the word *ability*, in order to give to the whole clause the sense contended for. Now it seems to me to be contrary to the first principles which ought to govern the construction of a remedial statute, to introduce words by implication for the purpose of narrowing the remedy and thereby excluding a particular class of cases that are obviously within the mischief. For if this construction should prevail, the mischiefs apprehended by Mr. Justice *Grose*, and verified by experience, would be met by a very inadequate remedy, as it will be found very easy to make such actions turn on representations and assurances that are collateral to the general ability of a third person. Such, for instance, as the representation of the value of a particular estate, either in land or goods; of the power to charge it, of the soundness of the title, of the expectations of the party, or his right to or well-grounded hope of a legacy, succession, inheritance, or office. The inquiry of the party seeking information will be ingeniously directed to some special object or circumstance, from which the ability of the party to perform the engagement upon which he is trusted with money may be inferred; and thus a plentiful crop of actions will be left behind, whereby, upon

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verbal representations alone, a defendant may be charged with the debt, default, or miscarriage of another. As in the present case, it is plain that the defendant is sought to be charged for the debt, default, and miscarriage of Lord *Edward Thynne*, in the non-payment of the annuity, which he contracted to pay; and one cannot very well see the policy of requiring a written representation of the general ability of Lord *Edward Thynne* to pay an annuity by means of his general pecuniary resources, and, at the same time, of excluding the necessity of a written representation of his ability to pay it out of, or by means of a particular unfettered fund. The one and the other are equally susceptible of misapprehension, of uncertainty, of distortion, of misconstruction, or of being invented by fraud, and supported by perjury. But after all, what does the general ability or substance of a man consist in, but in one or more particular sources from whence it is derived? He may have a landed estate, unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his banker's hands. Upon all or any one of these, his general ability may depend. Can it be said that a representation of any one of these sources of ability has no relation to his *general* ability? Suppose that, in the case now before us, the inquiry had been in the strictest sense concerning the general ability of Lord *Edward Thynne*, and the answer had been in these words, "I know nothing of his circumstances, but that he is entitled by his marriage settlement to the dividends for his life of a sum of 43,000*l.*, which are invested in the funds, and that at least one-half of these dividends are unfettered by any charge upon them," could this answer be said to have no relation to the question? Would it not be in effect an answer, from which the party inquiring might

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in land of 5000*l.* a-year, or 100,000*l.*, free of all incumbrances, or a large investment in goods addressed to a foreign market, upon which he may assign the bills of lading, would not be an inquiry respecting his ability, if the object of the inquirers were to obtain a specific security for money lent; but if the object were to lend money on his personal credit only, then the inquiry would relate to his ability, and consequently the answer to such an inquiry would or would not concern ~~or relate to the ability of the party~~ wanting the money, according to the intention of the party making the inquiry. The statement of such a conclusion, as the necessary consequence of the argument, is in effect a sufficient refutation of it. The statute says nothing of the object of the party making the inquiry, nor indeed of the inquiry itself. It speaks only of a representation or assurance concerning or relating to the ability of any other person, to the intent or purpose that such other person should obtain money, goods, or credit; and it seems to me that there is no necessity which compels us, nor advantage to be gained, that should induce us to mix up with these plain words, or to qualify them, by any reference to the object of the party to whom the representation is made, of taking security upon any specific fund for the money or goods obtained from him. The author of this statute appears to have had the statute of frauds before him. Some of his words are adopted from that statute, and where he has repudiated the words before him, and adopted others, he seems to have done so with a view not to narrow, but to extend his remedy to all possible cases in which litigation, fraud, or perjury might be prevented, by requiring a written document to attest a representation or assurance concerning, or relating to, ~~the~~ conduct, character, credit, or ability of another; by ~~means~~ of which representation and assurance, the party

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making it intended that other person to obtain money, goods, or credit. Now it is plain that the remedy proposed by the statute of frauds extended to a promise to pay any debt, or answer for any default of another, whether that debt was secured by mortgage or not, whether specific security was taken or not against the default; whereas by the construction now contended for, though a promise to pay a debt of another secured by mortgage is within the statute of frauds, yet a false representation of the value of the property is not within Lord *Tenterden's* act, nor can any representation of the value of specific property be determined to be within the act till the party to whom it is made shall have finally concluded whether he will take a specific security, or rely on the personal credit of the party who is represented to be able to give that security. It seems to me, therefore, that the true construction of the statute is, that the representation or assurance should concern or relate to the *ability* of the other person *effectually to perform and satisfy the engagement of a pecuniary nature into which he has proposed to enter*, and upon the faith of which he is to obtain money, credit, or goods; and as the representation in this case was clearly one of that nature, I think it was within both the words and spirit of the statute.

With regard to the remarks which have been made upon the introduction into the statute of the word *upon* without any grammatical relation to the other words in the sentence, I must observe, that I am decidedly of opinion that this word must be rejected as nonsense, and that we cannot admit of a conjectural transposition of it, in order to interpret the statute. Neither do I think that either of the conjectures offered the most probable account for the introduction of the word. The manuscript of this clause most probably contained the word *thereupon*; on revising it, the author considered

that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow the construction. He has therefore meant to strike it out, but has not carried his erasure into sufficient force through the latter part of the word. The word *upon* has therefore found its way into the print, and has escaped notice afterwards, when the bill was in committee. The printers of bills in the two houses seldom commit an error on the side of omission. Every thing which is not beyond doubt erased in manuscript is sure to be printed, and if it should afterwards escape detection in committee, finds its way upon the rolls of parliament and into the statute-book.

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Lord ABINGER added, the court being equally divided in opinion, the defendant is entitled to retain his nonsuit; but as the question, which is important, would thus be prevented from going further, the court will permit the rule to be made absolute on payment of costs to the defendant. The point may then be raised on the record, and carried to a court of error.

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WRIGHT *against* SKINNER.

DEBT for an attorney's bill. Plea: *nunquam indebitatus*. At the trial before the under-sheriff Where in an action of debt tried before the sheriff, the defendant

as suffered to prove in reduction of damages a part-payment of the plaintiff's demand, though *nunquam indebitatus* was the only plea on the record, the court refused a rule for a new trial, on the ground that the objection was not made at the trial, and it was not sworn that the plaintiff was taken by surprise by the evidence admitted.

*Quere*, if evidence of payment, either before or after action brought, can be given in evidence in debt or assumpsit under the general issue, in reduction of the damages?

Although since the uniformity of process act 2 W. 4. c. 39., an attorney can no longer sue by attachment of privilege, he is still entitled to sue in his own court; and therefore when he sues there, and recovers less than 40s. damages, the court will not enter a suggestion on the roll in order to deprive him of costs under the *Mid-dlesex* court of requests' act.

ALDERSON B.—If the plaintiff was taken by surprise, it should have been so stated in the affidavit.

GURNEY B. concurred.

Rule refused (a).

On a subsequent day, *C. Jones*, on the part of the defendant, moved to enter a suggestion upon the roll to deprive the plaintiff of costs under the *Middlesex* court of requests' act, 23 G. 2. c. 33., on the ground that the plaintiff, being resident within the jurisdiction of that court, had recovered less than 40s. damages. He contended, that although an attorney is not bound to sue out of his own court, yet on the authority of *Tagg v. Madan* (b), *Parker v. Vaughan* (c), and *Burn*

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(a) RICHARDSON v. ROBERTS.

ASSUMPSIT for money had and received. Plea: the general issue. At the trial before Lord Abinger C. B. the defendant offered to prove, in mitigation of damages, that he had paid 50*l.* after action brought, in part discharge of the demand. His lordship thought the evidence inadmissible under the plea, but agreed to receive it in order to save the parties expense, and a verdict was found for the plaintiff for 100*l.*, being his whole demand, the lord chief baron giving the defendant leave to move to reduce the verdict to 50*l.*, in case the court thought the evidence should have been admitted. Steer obtained a rule nisi in *Hilary* term 1836 for reducing the verdict accordingly; against which *Hoggins* showed cause in the ensuing *Easter* term. The rule was ultimately made absolute. During the argument Park B. referred to *Shirley v. Jacobs* and *Lediard v. Boucher*, and said that the same reason existed for allowing evidence of payment after action brought as before, namely, to reduce the damages; but whether those cases were properly decided was another question; and *Alderson* B. observed, that the court gave no opinion whether the damages in an action to which the general issue is pleaded may be reduced by evidence of payment after action brought, but decided the case upon its special circumstances.

A fuller report will be given hereafter.

(b) 1 B. & P. 629.

(c) 2 B. & P. 29.



*Patteson* is about to deliver the same judgment in a case which has come before him in the bail court.

ALDERSON and GURNEY Bs. concurred.

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Rule refused.

### ISAAC against FARRAR.

**A**SSUMPSIT by the indorsee against the maker of a promissory note for 250*l.*, payable three months after date, to the order of the maker, by him indorsed to one *H. R.*, and by *H. R.* indorsed to the plaintiff.

Plea: that before the making by the defendant of the said note, to wit, on &c., a certain advertisement had been and was inserted in a certain newspaper, to wit, the *Morning Herald*, to the tenor and effect following; that is to say,—“Money to lend upon Personal Security. Noblemen, Clergymen, and persons of responsibility requiring the temporary advance of money, can be immediately accommodated with loans to any amount at a very low rate of interest. Application to be made, in the first instance in writing, addressed to Mr. *Anderson*, No. 12, *Fludyer Street*, *Westminster*.” And the defendant saith, that in consequence of the said advertisement, he did, to wit, on &c., call at the said place, to wit, No. 12, *Fludyer Street*, and there saw one *Charles Anderson*, and that in consequence of the representations made to him by the said *C. A.*, he the defendant was induced to draw and deliver, and he did then draw and deliver to the said *C. A.* two promissory notes, whereby and by each of which the defendant promised to pay to his own order the sum of

The replication of *de injuriá* is proper in assumpsit where the plea admits a breach of promise, and contains only matter of excuse.

Where in an action on a bill of exchange it is pleaded that the bill was obtained by fraud, to which *de injuriá* is replied, the defendant will be allowed at the trial, after proving the fraud, to throw the onus upon the plaintiff of showing consideration.

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250 $\frac{1}{2}$  three months after the date thereof, (one of them then being the said note in the said declaration mentioned) upon the faith of and promise from the said C. A. that the said notes should be renewed, when due, for the space of two years, and that he should receive from the said C. A. on a certain day, to wit, the *Friday* then next following, being, to wit, on &c., the amount of the said notes, deducting discount and stamp: and that the said C. A. did not nor would, either on the said *Friday* or at any other time, although often requested so to do, pay to the said defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but on the contrary thereof he the defendant, to wit, on &c., by appointment of the said C. A., went to the said place, to wit, No. 12, *Fludys Street*, but the said C. A. was not, nor was any such person, either then or at any time afterwards, to be found; and that the said transaction was a gross fraud and imposition upon him the defendant; and that the note was indorsed to the plaintiff without consideration, and that he holds the same without value or consideration; and that there never was and is not any consideration or value on the said note between any parties thereto: and he further saith, that the said H. R. and the said plaintiff, and each of them, at the several and respective times when the said note was so indorsed and delivered to them respectively, was privy to and had full knowledge and notice of the said transaction in this plea detailed, and of the said fraud and imposition. Verification.

Replication, that the defendant of his own wrong, and without the cause by him in that plea alleged, broke his said promises in the said first count mentioned, in manner and form as the plaintiff hath in the said first count of the said declaration in that behalf complained against him.

Demurrer, assigning for causes, that the replication *de injuriâ suâ propriâ absque tali causâ* is a bad replication to the defendant's said plea in assumpsit; secondly, that the said replication of the plaintiff is bad from duplicity, because it is too large, and puts in issue all the several facts alleged by the plea, instead of putting in issue the point to be tried between the parties; thirdly, that the facts of fraud and notice to the plaintiff, and the want of consideration for the note in the plaintiff's hands alleged by the plea, are distinct and separate facts, on either of which the plaintiff might and ought to have tendered an issue, and he cannot by his replication put both in issue; and the said replication is bad, because it puts both such facts in issue.

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*Hoggins* in support of the demurrer. This replication is bad, inasmuch as it puts too many facts in issue. It may be admitted, that if it is necessary to traverse all the facts stated in the plea, in order to entitle the plaintiff to recover, that then the replication is good; but that is not the case. The plea alleges that the plaintiff was privy to the fraud. A clear issue would have been raised if the plaintiff had replied that he had no notice of such fraud; or he might have said that he had not been guilty of fraud, or have denied that any fraud had been committed. [Lord Abinger C. B. He might have denied that *Anderson* had been guilty of fraud.] If he had asserted that there was no fraud, he might have maintained the action whether he gave consideration or not; or he might have alleged that he had no notice of any fraud, and had given consideration for the note. It was the duty of the plaintiff to challenge one or so many facts as will form one issue and maintain his action; but here he has traversed more facts than it was requisite to do; as, for instance, the

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advertisement stated in the plea, which the replication forces the defendant to prove. In *Solly v. Neish* (a), was decided that this general replication was bad, where it put in issue an authority; and it may be urged here, that as the plea charges the plaintiff with being privy to the fraud, *Anderson* was his agent in the transaction.

*Humfrey* contra. Unless it is decided that this replication is good, there is now no case in which a party suing on a note or a bill cannot be driven to prove consideration. Previous to the new rules it was decided, that if fraud were shown between the original parties to a negotiable instrument, it was incumbent on the holder to prove that he or some previous indorser had given value; *Heath v. Sansom* (b). And under the old system, if the facts stated in this plea had been established at the trial, the plaintiff must have prove consideration; but now, if this replication be not allowed, a mere allegation of fraud upon the record will compel him to show that he has given value. It is stated in this plea, that the note was obtained by fraud, to which the plaintiff was privy. If he had not adopted the replication, he must have admitted either the fraud, or that he gave no consideration. If he had admitted the latter, a prejudice would have been raised against him in the minds of the jury; and if the former, not only would it have prejudiced him with the jury, but he would have had to prove consideration. There is a great difference between stating facts in a plea which are not sworn to, and calling witnesses to establish them; and the consequences will be very serious to plaintiffs if the mere putting of facts upon paper is to have the same effect as producing evidence. This

(a) *Trin. T.* 1835, 5 *Tyr. R.*

(b) 2 *B. & Ad.* 291.

tion has already come before the court in *Noel v. Ch(a)*, where the replication was the same as here, except that it did not contain the words "of his own making," which do not make any material distinction; if this replication is good in substance, the form of it is of no importance. In that case it was not necessary to decide the point; but, so far as the dicta of three of the judges of this court go, it is an authority. In *Crisp v. Griffiths (b)* also, the court expressed an opinion in favour of the replication *de injuriâ*, although it did not render any judgment upon it. All the decisions contain strong observations upon the importance of preserving the negotiability of bills. If the holder of a bill can be required in every case to prove that he gave consideration, it will cease to be any thing more than any other assignable contract.

*Hoggins* in reply. With respect to the negotiability of bills, it is the same thing whether they are affected by evidence or by pleading the facts upon the record, the argument applies equally to both. [*Parke B.* The difference is this: that unless a general form of replication is allowed, you can force a plaintiff to prove consideration by pleading, which you could only do by evidence under the old general issue.] This replication sets six distinct facts in issue, and should the defendant fail in proving any one of them, he cannot succeed: if it be allowed, the intention of the new rules will be completely defeated. [*Lord Abinger C. B.* The issue will still be reduced to facts, of which both parties are aware.]

**LORD ABINGER C. B.**—We understand that a similar case to the present is before the court of Common

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) *Trin. T.* 1835, see *Noel v. Boyd, ante*, 211.

) *East. T.* 1835, 5 *Tyr. R.*

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Pleas (a), and as it is a question of some importance we will defer our judgment, in order to ascertain the opinion of the judges of that court upon it. One inconvenience has occurred to me, which has not been urged on the part of the defendant. Formerly, fraud being sworn, the plaintiff was obliged to show consideration; but if this replication is allowed, the whole burthen of proof will be thrown upon the defendant; he will have to prove both fraud and want of consideration; he will have to prove a negative. Therefore it seems to me that he still ought, after proving fraud, to be permitted to cast the onus of showing consideration upon the plaintiff. If this replication is held good, some understanding must be come to upon this point.

PARKE B.—Formerly fraud was deemed *prima facie* evidence of no consideration, and probably the same course would be followed should this form of replication be allowed.

LORD ABINGER C. B.—My judgment in *Simpson v. Clarke* (b) having been referred to in the course of the argument, I have to observe that I never meant in that case to say that the mere fact of a bill having been given for accommodation, threw the burthen of proof upon the holder to show consideration; but that, in order to cast such an onus upon him, the other party must go further and prove fraud.

PARKE B.—I have always held that an accommodation acceptance did not imply that value had been given for it by the holder; and in *Percival v. Frumpton* (c), all the court expressed their concurrence

(a) See *Griffin v. Yates*, 2 Bing. N. C. 579.

(b) 5 Tyr. R. 593

(c) 5 Tyr. R. 579.

in the view I took in *Heath v. Sansom* (a). There certainly has been a practice at nisi prius, and Lord Tenterden used to call upon the plaintiff suing upon an accommodation bill to prove consideration; but I never could see on what principle that was done (b).

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*Cur. adv. vult..*

The judgment of the court was delivered on a subsequent day in the term by

Lord ABINGER C. B.—On this demurrer to the replication, two objections were made. First, that its form was improper, as the inducement of *de injuriâ* &c. was inapplicable to an action of assumpsit; and, secondly, that it was bad, because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action.

We think the replication is good, notwithstanding these objections.

This form, though most commonly used in actions of trespass or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only *matter of excuse* for having committed that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse *absque tali causâ*, and thereby denied, as matter of excuse alleged for the

(a) 2 B. & Ad. 291.

(b) In *Mills v. Barber*, Easter T. 1836, where in an action by the indorsee against the acceptor of a bill of exchange, it was admitted on the pleadings that the bill was an accommodation bill, and the issue raised was whether the plaintiff had given consideration; the court held, that the onus lay on the defendant to prove that the plaintiff had not given consideration for the bill.

the breach. In *Solly v. Neish* the plea was a denial of the promise: so in *Whittaker v. Mason* (b) the defendant denied the contract as alleged; and although the court intimated that it might be doubtful whether the plea in this form, was applicable to any action on promissory notes, they abstained from deciding that question. On the other hand, in this court, in the case of *Noel v. Richardson* the court expressed a strong opinion that this form of traverse, in a case similar to the present, was proper. And we think that it is; for the plaintiff confesses that the defendant made the note in question and indorsed it to *Richardson*, who indorsed it to the plaintiff, which constitutes a *prima facie* case of liability and an implied promise to pay the amount of the note to the plaintiff; and it avoids the effect of that admission, by showing that the note was made and indorsed, for its full value *bonâ fide* paid, whereby the defendant is excused from performing that promise.

As to the objection that the replication is multi-farious, the facts contained in the pleas, though they are several, constitute one ground of defence, and the rule of pleading is not that the issue must be joined on a single point, but on a single point of defence. This was laid down by Lord Mansfield, in *Robinson v. Rayley* (c), and by the Court of King's Bench in *O'Brien v. Saxon* (d), and affirmed by Justice Bayley, in the case of *Carr v. Hinckley*.



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In each of these cases the facts there allowed to be in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable, and *levant and couchant*, constituted one proposition, viz. that the cattle were entitled to common: in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of defence, viz. the bankruptcy of the plaintiff; and in the last, the fact of the goods, for the price of which the action was brought, being sold by an agent, as principal, and a set-off of a debt due from the agent, constituted the defence of payment or satisfaction of the plaintiff's demand.

So in the present case the plea contains, in substance, one ground of defence only, that is, *that the plaintiff was not the bonâ fide holder for value*, although several facts are necessarily averred, as constituting parts of it. Every indorsee of a bill has his own title, and that of each intermediate party; and if he or any of such parties gave value for the bill, without fraud, he is a holder for value. The plaintiff in this case alleges, in effect, that the defendant had no value for making the note, and that neither the first indorsee nor the second received the bill *bonâ fide*; which is only a statement, necessary in point of law, of the several facts constituting the defence that the plaintiff is not a *bonâ fide* holder for value.

If this replication were not allowed, some inconvenience would follow, for in every action on a bill or note it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it. For it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such an allegation; and then he would be obliged to take an issue, which would admit the fraud and throw the

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proof of value on himself, thereby placing himself in a worse situation than before the late rules. On the other hand, if this replication be allowed, the indorser is left in the same situation as he was before; with the additional advantage, that he is made acquainted with the defence to be set up, which was one great object of the late pleading regulations; and he will be called upon to prove value given, or not, accordingly as the defendant shall prove, or fail in the proof of the allegation of fraud, as he would before, under the general issue.

We do not, however, decide this case on the ground of convenience, but in conformity with the established rules of pleading; and we are of opinion that the *murrer* must be overruled.

Judgment for the plaintiff.

THOMAS *against* SHILLIBEER and MORTON.

Assumpsit for money had and received.

Plea of S. one of the defendants, as to 25*l.*

ASSUMPSIT for money had and received, and on account stated. The defendant *Shillibeer* pleaded first, except as to the sum of 25*l.* parcel, &c., a parcel &c., that he and *M.* were carrying on, in partnership, the business of omnibus proprietors, and that while they were such partners, the plaintiff deposited with them 25*l.* as a security for faithfully accounting for the moneys received from him as their servant. That the partnership between *S.* and *M.* was afterwards dissolved by consent; and upon such dissolution it was agreed between them that *S.* should take upon himself the payment of certain of the debts due from them, and retain in his sole employ certain of the servants; and that *M.* should take upon himself the payment of other part of the debts, and retain in his sole employ other of the servants. That *M.* in pursuance of the agreement took upon himself the payment to the plaintiff of the 25*l.* deposited by him with the defendants, and retained the plaintiff in his sole employ. The plea then averred, that the plaintiff had notice of all the premises, and assented to the last-mentioned agreement, and to the undertaking and retainer of *M.*; and in consideration of the premises discharged from the 25*l.*

Replication, that *M.* did not retain the plaintiff in his sole employ, nor had the plaintiff notice of all the premises, nor did he assent to the last-mentioned undertaking.

*assumpsit*: secondly, as to the said sum of 25*l.*, parcel &c. *actionem non*; because he says that heretofore, to wit, on &c., the defendants *Shillibeer* and *Morton* were carrying on together in partnership a certain business, to wit, the business of omnibus proprietors, and were employing therein many servants and agents; and that whilst they were such partners as aforesaid, to wit, on &c., the plaintiff deposited with the defendants, as such partners as aforesaid, the said sum of 25*l.* parcel &c., as security for the plaintiff faithfully accounting for all monies received by him as their servant, to wit, as their conductor, to be repaid to the plaintiff on his quitting their employ. And the defendant *Shillibeer* further says, that afterwards, to wit, on &c. the said partnership between the said defendants was duly dissolved, to wit, by their mutual consent in that behalf; and that upon the occasion of the said dissolution it was agreed by and between the defendants, that the defendant *Shillibeer* should take upon himself the payment of a certain part of the debts due and owing from the defendants as such partners as aforesaid, and should retain in his sole employ certain of the said servants then lately employed by the defendants in their joint business as aforesaid; and that *Morton* should take upon himself the payment of a certain other part of the said debts, and should retain in his sole employ certain others of the said servants. And the defendant *Shillibeer* avers, that *Morton*, in pursuance of the said agreement, then took upon himself the payment to the plaintiff of the sum of 25*l.* parcel &c., so deposited by the plaintiff with

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and retainer of *M.* or discharge of *S.* from the 25*l.* At the trial the defendant *S.* obtained a verdict on this issue.

The court made a rule absolute for entering judgment for the plaintiff, *non obstante verdicto*, on the ground that the plea disclosed no agreement making *M.* solely liable to the plaintiff in respect of the 25*l.*; and, consequently, that there was no consideration for the discharge of *S.*

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sirous that the plaintiff should remain with him, but the plaintiff declined on account of there being a considerable opposition to *Shillibeer's* omnibusses, and none to those of *Morton*, with whom he expressed a wish to stay. That *Shillibeer* then told the plaintiff that if he went with *Morton* that he was to look to *Morton* for his security money; upon which the plaintiff replied, that he was quite satisfied, or words to that effect. It appeared, that in consequence of this arrangement the plaintiff entered into *Morton's* service, with whom he remained for upwards of a year. The learned judge, in summing up, told the jury that the replication admitted the fact of the agreement stated in the plea between *Shillibeer* and *Morton*; and that the question for their consideration was, whether there had been such an adoption of the transfer of the debt to *Morton* alone by the plaintiff, as precluded him from recovering the 25*l.* from *Shillibeer*. The jury having found a verdict for the defendant *Shillibeer*,

*Crowder* moved for a rule nisi why judgment should not be entered for the plaintiff *non obstante veredicto*, or why there should not be a new trial, on the ground of misdirection. In support of the first branch of his application he contended that the plea was no answer to the action, as it admitted the debt to be due, but made out no discharge, and also that it stated no consideration for such discharge, citing *Price v. Easton* (a), and *Thomas v. Percival* (b). He also submitted that the agreement was not pleaded to be in satisfaction of the debt due from *Shillibeer* to the plaintiff. [*Parke* B. If the plea is sufficient in other respects the agreement is a satisfaction. Lord *Abinger* C. B. Your substantial objection is, that there is no agreement on the part of the plaintiff.]

(a) 4 B. &amp; Ad. 433.

(b) 5 B. &amp; Ad. 925.

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Secondly, the judge did not state the issue and the effect of the evidence correctly to the jury. [*Alderson* B. The substance of the replication is, "I admit the fact, but had no notice of it." *Parke* B. The replication admits that *Morton* had taken the debt upon himself, and only puts in issue that the plaintiff had notice. *Alderson* B. Your replication would otherwise be a trap to the other party, who only comes prepared to prove notice. *Bolland* B. The plaintiff was told he must look to *Morton* for the debt, and he acquiesced. There was no evidence that *Morton* had agreed to pay him. [*Parke* B. There was no evidence that he was told *Morton* had agreed to pay him.] It is quite consistent that there was a transfer of the service of the plaintiff to *Morton* without a transfer of the debt. The learned judge should have put it to the jury whether upon the evidence they could assume that *Morton* had agreed to pay the plaintiff. [*Parke* B. There was enough to go to the jury. It might be implied from the expression, "you must look to *Morton*," that *Morton* had agreed to pay the debt.]

Rule nisi granted upon the first ground, but refused upon the second, the court being of opinion that there was no misdirection.

*Barstow* now showed cause against the rule for entering judgment for the plaintiff *non obstante veredicto*, and contended that the plea was sufficient. [*Parke* B. The objection is, that the plea does not disclose sufficient matter to enable the plaintiff to sue *Morton*, as it does not state that the latter promised to pay the former the 25*l.*] The judgment of the Court of King's Bench in *David v. Ellice* (a) excited great surprise; but supposing it to be law, the present case

(a) 5 B. & C. 196; 7 D. & R. 690.

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is distinguishable, for here the plea discloses a sufficient consideration. [*Parke B.* The question is, whether matter appears in the plea that would prevent *Morton* from pleading in abatement, in case an action were brought against him.] If you show facts which give a cause of action against *Morton*, it is sufficient; and here, if the facts stated in the plea were proved in evidence by the plaintiff in an action against *Morton*, he would be entitled to recover. If the difficulty be that the plea does not aver a promise by *Morton* to pay the plaintiff, such a promise is not requisite, for a promise is the legal result of certain facts; and if those facts are made out, there is no necessity for a promise. Suppose that there has been a loan of 50*l.*, of which there is no evidence but a declaration of the party that he borrowed the money, but would not pay it; having got the fact of the money having been lent, there is no necessity for a promise to repay it by the borrower. Again, suppose in an action against *Morton* this agreement had been stated, and that in consideration of such agreement he undertook to pay the money, it would not, on *non assumpsit* being pleaded, be necessary to prove a promise by him to the plaintiff. [*Alderson B.* A parallel case to the present would be a declaration against *Morton*, without an averment that he undertook to pay the money. *Parke B.* That would be a similar case to *Price v. Easton (a)*.] Assuming the facts to be properly set out, and to be supported in evidence, they would sustain a declaration against *Morton*, for an agreement to do a thing is the same as a promise. [*Alderson B.* How can we infer an agreement with the plaintiff when you do not state any agreement on the record? *Lord Abinger C. B.* You are not to plead evidence, what you want in this

(a) 4 B. &amp; Ad. 433.

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plea is not an implied, but an express promise from *Morton* to the plaintiff.] In *Price v. Easton*, the sole ground for arresting the judgment was, that the plaintiff was a stranger to the consideration, but the plaintiff is not so here. [Lord *Abinger* C. B. I see nothing in the plea but that the plaintiff has wholly released the 25*l.* You are asking us to draw an inference from facts which might justify a different conclusion.]

The question is, whether the agreement is not stated so as to give the plaintiff a clear right of action against *Morton*, upon which the plaintiff discharged *Shillibeer* from his promise. [*Parke* B. The agreement is between the defendant and a third party, and there is no binding obligation on such third party to pay the plaintiff. It is sufficient to show an advantage to the plaintiff or a disadvantage to the defendant, but how do you do that here?] There is here both an advantage to the plaintiff and a disadvantage to the defendant *Shillibeer*, as by the agreement the former is retained in the service of *Morton*, and the burden cast on the latter of paying certain of the debts. [Lord *Abinger* C. B. The only disadvantage to *Shillibeer* is, that he renounces the keeping of the 25*l.* in his hands. *Alderson* B. The disadvantage to the defendant must be incident to the contract of the plaintiff.] It is not however necessary to show facts giving the plaintiff a clear right of action against *Morton*; it is sufficient to show a consideration for the discharge to *Shillibeer*. [Lord *Abinger* C. B. You must show that he has a remedy against some one else in consideration of such discharge. *Parke* B. The difficulty is, that there is no contract with the plaintiff at all. It is not that there is not a sufficient consideration for a contract, but the first step is not taken by proving a contract.] If there is a sufficient consideration for

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discharging *Shillibeer*, it is not necessary that there should be a contract by the plaintiff with *Morton*. There is an agreement between the two partners, after which *Shillibeer* goes to the plaintiff, and says that he is to keep some of the servants and *Morton* others, and asks the plaintiff if he is willing. [Lord *Abinger* C. B. But *Shillibeer* telling this to the plaintiff does not make the latter a party to it. *Alderson* B. Had *Shillibeer* said, "I am going to make such an agreement," it might have been different. *Parke* B. There is no doubt that a proper plea might have been framed upon the facts of the case; the question is, whether this plea is sufficient. The only point is, whether there may not be a consideration for discharging *Shillibeer*, arising out of the sole retainer of the plaintiff by *Morton*, which retainer is averred. That is the only mode by which there is a possibility of sustaining the plea.]

*Crowder* contra. The sole question upon the plea is, whether it discloses a contract between the plaintiff and the defendant *Morton*. It goes on the supposition that the debt is still subsisting, and is transferred to *Shillibeer*; but if, as stated in the plea, *Shillibeer* is discharged by the agreement that the debt shall be transferred from him and *Morton* to *Morton* alone, the latter is equally discharged. It was never intended that there should be a consideration moving from the plaintiff to *Shillibeer*, or from the latter to the former, either by way of advantage or disadvantage to the one or the other. [*Parke* B. The only part of the plea where the plaintiff comes in contact with *Morton* is the part relating to the retainer.] The plaintiff was the servant of both partners, and it is not a sufficient consideration that he is to be retained by one. He was then stopped by the court.



received the said note in full satisfaction and discharge of the said bill.

Replication: that although true it is that the said *Parish* did make and deliver to the plaintiff the said promissory note in that plea mentioned in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned, yet the plaintiff avers that the said promissory note became due and payable according to the tenor and effect thereof at a day long since elapsed, to wit, &c.: and that the said promissory note still remains in the hands of the plaintiff wholly unpaid and unsatisfied.

Demurrer, assigning for causes, that it is by the replication admitted that the plaintiff took and received the said promissory note from *Parish*, with notice that the defendant had accepted the bill for the accommodation of *Parish*, and without consideration or value: and also that *Parish* made and delivered the note to the plaintiff, and he took the same, not merely on account or in payment of the bill, but in full satisfaction and discharge thereof, and of the cause of action in the first count mentioned: nevertheless the plaintiff hath stated and attempted, in answer to the said plea, to put in issue a matter immaterial to the decision of this cause in regard to the said plea; that is to say, that the said note hath not been honoured by *Parish* and is unpaid; whereas if, as is admitted, the said note was taken absolutely in satisfaction and discharge of the said cause of action in the first count mentioned, the defendant's liability on the said bill could not revive upon the dishonour of the said note, and the note of a third person may be an absolute discharge and extinguishment of the claim upon a bill of exchange: and also for that it is not alleged in the replication that the said note became due or was dishonoured before the

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commencement of this suit, or was then in the plaintiff's hands, or that *Parish* was ever requested to pay the same, or that the same was presented for payment or that the defendant had any notice of its non-payment, or was after the dishonour of the said note requested to pay the amount of the said bill. Joinder in demurrer.

*Thesiger*, in support of the demurrer, was stopped by the court.

*Tyndale* contra. He submitted, that the note given in substitution was made by the drawer of the bill, and as it was dishonoured, the debt upon the bill was not discharged, and referred to *Richardson v. Rickman*, as cited in *Kearslake v. Morgan* (a). [Lord Abinger C. B. This appears to be a plea of accord and satisfaction, and you by your replication admit it to be such, but want to treat it as a collateral security. *Parke B.* Your agreement is to take the note for better or worse. The bill is for 43*l.*, and the note for 44*l.*, and that will constitute a good consideration for the accord and satisfaction pleaded.] The remedy on the bill in this case was only suspended. [*Parke B.* Your sole remedy is upon the note.]

*Tyndale* applied to amend.

PARKE B.—You want to take issue on the averment that the note was given in full satisfaction of the bill. You say that it was only given by way of collateral security. It seems to have been a slip.

(a) 5 T. R. 513.

*Per Curiam.*—(Lord ABINGER C. B., PARKE, BOL-  
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Leave to amend on payment of costs.

**WOODCOCK against KILBY, Clerk.**

A Capias had been issued against the defendant and another on an affidavit of debt sworn against both, but the defendant only was arrested under the writ, and on the 14th *December* the plaintiff declared against him alone. Notice was given to the plaintiff's attorney that the declaration was irregular, and he was told to amend it, but he declined to do so; whereupon a summons to set aside the declaration was taken out at chambers, which was dismissed by *Gurney B.* on the authority of *Caldwell v. Blake*, as reported in *Dowling's Practice Cases (a)*. The learned judge also refused to stay the proceedings in order to allow of an application to the court; but, with the consent of the plaintiff's attorney, gave the defendant a week's time to plead, which was subsequently renewed under different summonses, the period granted by the last being still unexpired.

A declaration against one defendant, who has been arrested under a *capias* issued against such defendant and another, is irregular.

The defendant in vacation took out a summons at chambers to set aside the declaration for such irregularity, which was dismissed by the judge, who refused to stay the proceedings in order to allow the defendant an opportunity of applying to the court, but granted him time to plead, which was renewed under successive summonses, until the commencement of term: Held, that there was no waiver of the irregularity.

*J. Jervis* now moved for a rule to set aside the declaration, which, he submitted, was clearly irregular. *Caldwell v. Blake*, as appears from the other reports of it (*b*), was a case of serviceable and not ofailable process; and *Carson v. Dowding (c)* shows that the distinction existing between the two kinds of process

(a) Vol. iii. 656.

(b) *Easter T.* 1835, 5 Tyr. R. in the press; 2 Cr. M. & R. 249.

(c) 4 Dowl. P. C. 297.

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under the old practice still prevails. The court granted a rule, against which

*Bayley* on a subsequent day showed cause. *The* plaintiff has committed no irregularity in declaring against the defendant alone. [*Bolland B.* In the case of *Carson v. Dowding*, the difference between bailable and serviceable process was distinctly recognized. *Parke B.* It was the ancient practice, that in bailable process the affidavit of debt, writ, and declaration should agree.] At any rate the defendant has waived the irregularity, for he has obtained further time to plead under no less than five different summonses. [*Parke B.* They were all before the term.] He should have applied to the court as early as he could. [*Parke B.* He could not come before the first day of term.] The defendant ought not to have put the plaintiff to the expense of attending so many summonses, but should have given notice that he intended to apply to set aside the proceedings for irregularity.

*J. Jervis* contra. The defendant was obliged to take out successive summonses for time to plead, in consequence of the learned judge having refused to give him an opportunity of applying to the court.

PARKE B.—There is no question that this is an irregularity, and that it has not been waived by what has taken place.

*Per Curiam*.—(Lord ABINGER C. B., PARKE, BOLLAND, and GURNEY Bs.)

Rule absolute.

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GREGORY *against* HARTNOLL.

**A**SSUMPSIT for money paid to the use of the defendant, and on an account stated. Pleas: first, the general issue; secondly, as to 34*l.* 2*s.* 4*d.*, parcel &c.: that the said sum was paid by the plaintiff to the use of the defendant, in manner hereinafter mentioned, and in no other manner, and upon no other account; that is to say, as one-sixteenth part or share of the damages and costs recovered against the plaintiff in a certain action on the case, which was prosecuted by *W. A.*, *W. A.* the younger, and *T. A.*, against the plaintiff in the court of our lord the king, before the king himself, the same court then and still being holden at *Westminster*, in the county of *Middlesex*, wherein the said *W. A.* &c., complained against the plaintiff as the owner of a certain sloop or vessel called the *Commerce*, of which sloop or vessel the defendant, at the time of the loss hereinafter mentioned, was a part-owner to the extent of one-sixteenth part or share, in respect of the loss of certain goods shipped by the said *W. A.* &c., on board the said sloop or vessel, to be carried and conveyed in and on board the said sloop or vessel, from the port of *Barnstaple*, in the county of *Devon*, to the port of *Bristol*, and which loss the said *W. A.* &c., in their said action alleged to have happened in the said action to have happened through the negligence of the plaintiff by his servants. The defendant then averred, that the said loss was not wholly caused by the negligence of the plaintiff by his servants, but that the same happened through the personal misconduct and fault of the plaintiff.

Assumpsit for money paid. Pleas: first, that the money was paid to the defendant's use in respect of one-sixteenth share of the damages and costs recovered in an action which was brought by certain parties against the plaintiff, wherein they complained against the plaintiff as the owner of a vessel, of which the defendant was a part-owner to the extent of one-sixteenth share, in respect of the loss of certain goods shipped on board of the said vessel to be carried from *A.* to *B.*, and which loss was al-

Secondly, that the defendant was the legal owner of a sixteenth part of the said vessel at the time that the said goods were shipped, and continued to be such owner when they were lost, yet he did not concur with the plaintiff and the other part-owners of the said vessel in the employment thereof on the said voyage, but that the said voyage was undertaken for the advantage and at the risk of the plaintiff and certain other persons, and without the defendant being concerned in the adventure.

Held, on special demurrer, that both of the pleas were bad, as they amounted to the general issue.


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pened by and through the mere carelessness, negligence, and improper conduct of the plaintiff by his servants and mariners: and the defendant in fact says, that the said loss of which the said *W. A. &c.*, in their said action complained, was not wholly caused by and through the carelessness, negligence and improper conduct of the plaintiff by his mariners and servants, as in the said action alleged; but, on the contrary thereof, the defendant says, that the plaintiff, by and through his own personal and wilful misconduct and interference in and about the management and stowage of the said sloop or vessel, contributed to the said loss, and that the same happened by and through the personal and direct fault and wrong-doing of the plaintiff. Third plea: that the said sum of 34*l.* 2*s.* 4*d.* was paid by the plaintiff for the use of the defendant, in the manner in the said second plea mentioned, and in no other manner, and upon no other account. And the defendant says, that although true it is that the defendant was the legal owner of a sixteenth-part or share of the said sloop or vessel in the said second plea mentioned, at the time the said goods were shipped in and on board the same sloop or vessel, as in that plea mentioned, and continued to be such legal owner at the time of the loss in that plea also mentioned; yet the defendant in fact says, that he did not join or concur with the plaintiff and the other part-owners of the said sloop or vessel in the employment of the said sloop or vessel on her said voyage from the port of *Barnstaple* to the port of *Bristol* in the second plea mentioned, but the said voyage was undertaken and carried on for the profit and advantage, and at the risk of the plaintiff and certain other persons, separate, apart, and distinct from the defendant, and without his being concerned in or in any way sharing or participating in the said adventure.

Demurrer to the second and third pleas, assigning

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for causes, that it does not in any manner appear in and by the said second plea, that the loss therein mentioned was wholly attributable to the wilful misconduct and interference of the plaintiff in the matters in that plea mentioned, and for that it is perfectly consistent with the allegations in that plea, that the personal and direct fault and wrong-doing of the plaintiff in that plea mentioned, was at most a mere error in judgment on the part of the plaintiff, and by no means the result of any wilful tort or malfeazance on his part: and for that the same pleas do not, nor does either of them, contain matter in confession and avoidance of the promise in the declaration, in so far as it relates to the sum of money in the introductory part of those pleas respectively mentioned: nor does either of those pleas give even a colourable right of action to the plaintiff, but each of them, on the contrary, sets forth only matter in negation of the promise alleged in the declaration, and amounts therefore to the general issue “non assumpsit;” and is besides contradictory and repugnant in its allegations in this, that it commences by alleging that the money therein respectively specified was paid to the use of the defendant, and proceeds with averments in direct contradiction thereto: and for that the said third plea does not show any contract or other matter whereby the defendant was excluded from being concerned in and sharing and participating in the said adventure: and for that the said pleas tend to unnecessary prolixity, &c. Joinder in demurrer.

*Crowder* in support of the demurrer. These pleas are contradictory, for they commence by admitting that the money was paid to the use of the defendant, and then set out circumstances which show that it was not so paid. The law with respect to cases of implied assumpsit is not altered by the recent rules of pleading.

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The action depends upon facts, all of which may be given in evidence for the defendant under the general issue, which is in this respect as wide as before. And where parties plead what amounts to the general issue it is still bad on special demurrer; *Solly v. Neish* (a) [Parke B. Your argument applies more strongly to the third plea than to the second. It is difficult to say that the third does not amount to the general issue, but does the other? The plaintiff says that he and the defendant were jointly liable upon a breach of contract in respect of which he had been obliged to pay money. The defendant does not deny these facts, but says that the plaintiff incurred the loss through his personal negligence. The other plea amounts to this: that they were not partners, as the plaintiff employed the ship on his own account. Lord Abinger C. B. The third plea is to this effect, that the money paid by the plaintiff was paid on his own account; the second plea says that the money was paid by the plaintiff in respect of a loss which was occasioned by his own misconduct. Parke B. The defendant says in the third plea, that he never gave the plaintiff any implied authority to pay money where he acted on his own account. In the second plea, he admits that the plaintiff paid money, which relieved him from liability; but says that the plaintiff by his own act, incurred the liability. With respect to third parties, they are both liable, however the loss may have happened.] In *Carr v. Hinchliff* (b), it is fully laid down what pleas do not amount to the general issue; but the present pleas do not fall within the principle established in that case, for there is nothing in them which does not go to the root of the action, and show that the plaintiff had no implied authority to pay the money.

(a) 5 Tyr. R. Pt. 4, in the press.

(b) 4 B. &amp; C. 547.



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*Montagu Smith* contra. The second and third pleas are pleas of confession and avoidance, and the facts stated in them could not have been given in evidence under the general issue. By the rule of H. T. 4 W. 4. as to pleadings in particular actions, No. I., the general issue in *implied* assumpsit does not deny the promise, which is only an inference of law, but the existence of the facts from which the promise may be implied. The words are "In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." These pleas admit the facts from which the promise alleged may be implied. They deny none of those facts; but they suggest new facts, which avoid the effect of those admitted. The second plea admits that the plaintiff and defendant were part-owners of a vessel, and that they carried goods; it then alleges that an action was brought against the plaintiff in respect of such goods, and that he paid the money. This would be a *prima facie* case for the plaintiff at the trial which must be met; and it is answered by this plea. It is submitted, that if the defendant chooses, he may plead a plea that admits a *prima facie* right of action and then avoids it. The old plea in trespass gave colour, this gives real colour. [*Parke* B. Have you stated all the facts in the second plea that would enable the plaintiff to recover? The defendant alleges that the loss happened by the fault of the plaintiff. It is a question, whether there is a previous admission of every fact, that it would be necessary to make out in order to establish a *prima facie* case. What are the precise facts that the plaintiff would be bound to prove?] He would have to prove that the defendant is a part-

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*Holt* says, "In many cases, though a man plead a thing which may be given in evidence, yet this shall not amount to a general issue." In *Maggs v. Ames* (a) matter was allowed to be pleaded, though it might have been given in evidence under the general issue. Properly speaking there is now no general issue. [*Parke* B. In a case of implied assumpsit it puts in issue the facts stated in the declaration. Lord *Abinger* C. B. Is not the plaintiff bound to prove that he has paid money, either at the request, or to the use of the defendant?] This plea does not deny or dispute any one of the facts necessary to the plaintiff's case, but mentions new matter, which it suggests for the consideration of the court. With respect to the third plea, that also does not dispute those facts, but sets out new matter, which destroys the inference which would otherwise have arisen from them. [Lord *Abinger* C. B. Suppose that *A.* and *B.* jointly accept a bill, and *A.* receives the value. When the bill is due it is paid by *A.*, who brings an action against *B.* to recover half of the amount. Could not *B.* defend the action under the general issue, or must he allege that he had no interest in the money received for the bill?] The difficulty is, that the courts consider the general issue as still denying the promise, instead of the facts from which it may be inferred. If it can be shown that the general issue, qualified as it now is, does not in every case deny the promise, but is only a special mode of denying the facts, then the third plea is to the same effect as the second. Now the infancy of the defendant cannot be given in evidence under the general issue; and yet the effect of that fact is, that no contract can be implied where it exists, *Thornton*

(a) 4 Bing. 470 ; S. C. Moore & P. 294.

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v. *Illingworth*(a). So in the case of coverture, it must be pleaded. It is clear, therefore, that the general issue in implied assumpsit is not what its terms import—it does not deny the promise. [Lord Abinger C. B. You are rather confounding what would be evidence to prove the facts, with the pleading of those facts. Joint ownership is evidence of joint liability; but it is only *prima facie* evidence, which you rebut by denying that there was a joint contract.] The pleas amount to this:—the avoidance of one set of facts from which, taken alone, the promise may be inferred, by another set of new and independent facts. If the court hold that the general issue in implied assumpsit denies the promise, then undoubtedly this plea is bad. [*Parke B.* There must be an implied request to maintain this action.] The third plea denies that there was any joint contract, and shows a state of facts from which no joint contract can be inferred. It does not deny the facts which are necessary to establish the plaintiff's case, but the inference arising from them by stating new facts. The joint promise is only an implication from the joint ownership.

*Crowder* in reply. In the cases cited on the other side the pleas confessed and avoided the declaration by matter of law. [*Parke B.* The difficulty on the second plea arises under the new rules. There is no doubt that the general issue, according to the old system of pleading, would have denied that the money was paid for the defendant at his request. The new rules state, that the general issue shall be a denial of all facts from which a promise may be inferred. Here the fact inferred is not the payment of the money, for that is the fact stated, but that the

(a) 2 B. & C. 826.

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Money was paid to the use of the defendant. The defendant by his plea denies that the money was paid to his use, so that no inference can arise. [Lord Abinger C. B. Suppose a man brings an action against another for money paid for the repair of a ship, and the defendant pleads the general issue and puts in the register, which is in the name of the plaintiff, the latter may show that he was only a mortgagee.] The new rules have made no difference with respect to the pleading of the general issue. It is laid down in *Carr v. Hinchliff*, that there must be a confession and avoidance of the plaintiff's right of action by matter *ex post facto*, or by matter of law, in order to entitle the defendant to plead specially to the declaration. [Parke B. The subsequent rule of pleading in *assumpsit*, No. 3, seems to have provided for all these cases, and it appears to have been intended that you may give in evidence under the general issue, all matters that cannot be so pleaded. The third plea is clearly not a plea of confession and avoidance.]

LORD ABINGER C. B.—It is a fallacy to call that new matter, which is a fact to rebut the facts which establish a *prima facie* case for the plaintiff. It is very important to bear in mind the distinction between a fact, and the evidence by which such fact is proved, and which may consist of a variety of circumstances. I am of opinion that both the pleas are bad.

PARKE B.—In case the general issue was pleaded to the present action, the plaintiff would be bound to prove, either that the money was paid at the defendant's request, or a state of facts from which the law would imply a request. Nothing can be specially pleaded to the action which does not confess that at one time there was money paid to the defendant's use. The effect of such

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THOROTON and Others *against* WHITEHEAD.

**D**EBT for double rent under 11 *Geo.* 2. c. 19. s. 18., with a count for use and occupation of the same premises, which were held by the defendant at the yearly rent of 35*l.* 4*s.* The plaintiffs by their particulars claimed the sum of 70*l.* 8*s.* for rent of the premises. The case had been before *Gurney* B. at chambers, by whom it was referred to the court.

*J. Bayley* moved for a rule to show cause why one of the above counts should not be struck out of the declaration, pursuant to the general rule of *H. T.* 4 *Will.* 4. No. 6. (a) He submitted, that the introduction of the two counts was a violation of the fifth rule of the same term, and cited *Lawrence v. Stephens* (b), where it was held by this court, that debt for not setting out tithes could not be joined with a count for the same tithes bargained and sold. Here the plaintiffs by their particulars show that they are proceeding for the double rent, and that they are not seeking to recover under the count for use and occupation.

**PARKE B.**—The order in *Lawrence v. Stephens* was more the result of a compromise between the parties, the defendant undertaking not to set up a composition in lieu of tithes at the trial, than of the considered decision of the court; and we doubted much afterwards whether we ought to have granted the rule. The counts in this declaration proceed for distinct matters of complaint; the one is for a penalty under a statute, and the other for the simple enjoyment of the land, and the plaintiff cannot recover for both. There is therefore no ground for applying to the

A count in debt on the 11 *Geo.* 2. c. 19. s. 18. for double rent of premises held over by a tenant after giving notice to quit, may be joined with a count for use and occupation of the same premises, during the same period.

The plaintiffs, by their particulars, restricted their demand to the first count. The court refused a rule to strike out the second count, on the ground that the mistake in the particulars was one by which the defendant could not be misled.

(a) *Tyr. R.* p. xi.(b) 3 *Dowl. P. C.* 777.

sizes, you could not have obtained a judgment as in case of a nonsuit, and I do not see why you should do so because it took place before the sheriff.

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ALDERSON B.—You may move to discharge the order for the writ of trial, and then you can take the cause down to the assizes by proviso.

The court having given *Williams* leave to mention the cause again, he renewed his application on the following day. He admitted that the practice undoubtedly is, that when a plaintiff has once taken down a cause to trial at the assizes, that a judgment as in case of a nonsuit cannot afterwards be obtained. The question is, whether the court will lay down the same rule with respect to cases tried before the sheriff under a writ of trial.

LORD ABINGER C. B.—I see no reason for a different rule, unless the act, under which writs of trial are issued to the sheriff, makes a distinction. Does the 14 Geo. 2. c. 17. apply to writs of trial? If it does, it ought to apply with all its incidents. But even if writs of trial should not be within that statute, the plaintiff has complied with the usual course of practice, in taking the case before the sheriff after having given notice of trial. As this is the first time that the point has arisen in any of the courts, you may take a rule to show cause: the question will be, whether writs of trial should follow the practice which has arisen under the provisions of the 14 Geo. 2. c. 17., or we should adopt some other rule.

PARKE B.—The question may be raised, whether the defendant can have a writ of trial to the sheriff. There has already been an order for a writ to him.

Rule nisi (a).

(a) The rule was never drawn up, and nothing more was heard of the case.

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JENKINS *against* TRELOAR.

Assumpsit for toll of coals imported into the port of *Truro*. The declaration contained two counts, the one claiming the toll as a metage duty, and the other as a port duty.

Held, that these counts were for the same subject-matter of complaint within the meaning of the rule of *Hil. T. 4*

*W. 4. No. 5.*; and the court made a rule absolute for striking one of them out, unless, on a reference back to the judge at chambers, he should exercise the discretion given him by the rule, and allow both counts, upon the plaintiff undertaking to give distinct evidence in support of each.

**A**SSUMPSIT for a duty of fourpence per chaldron on coals imported by the defendant into the port of *Truro*. The action was by the same plaintiff as in *Jenkins v. Harvey (a)*, and the declaration consisted of two counts, the first being the same as the first count in that case, except that the metage was not claimed as an immemorial payment; the second count was the same as the fifth, claiming the toll as a port duty.

*Crowder* for the defendant had obtained a rule nisi why one of the above counts should not be struck out, as being for the same subject-matter of complaint. An application had previously been made at chambers to *Parke B.*, and on that occasion the attorney for the plaintiff undertook to give distinct evidence in support of each count, should the learned baron be of opinion that the case was within the rule of *Hilary term, 4 W. 4. No. 5.* His lordship however conceived that it was not, and refused to make the order.

*Cowling* now showed cause. Previous to the new rules of pleading, the law of variance was strict with regard to what were supposed to be matters of substance, although they did not go to the merits of the action; and a plaintiff, to guard against such objections, was obliged to introduce several counts into his declaration. The learned judges wished to abolish different counts, but before doing so it was requisite to alter the law of variance, which was effected by the 3 & 4 *W. 4. c. 42. s. 23.*, under which a judge may now amend even matter of substance, where it does not affect the merits

(a) 5 Tyr. 326.

of the words "same subject-matter?" The  
means that the plaintiff shall not set out the  
transaction in different counts, but it does not  
where the plaintiff has different rights resulting  
same state of facts, for such a case was not  
the law of variance; neither is it within the  
of amendment given by the recent statute, for  
of variance is alone applicable where there are  
statements of the same facts. The rule says,  
counts founded on the same contract are not to be  
and then proceeds to give examples, all of  
the instances of the same transaction, varied  
the form of statement. [*Parke B.* The example  
nearest the nearest to the present case is that of  
for not giving or delivering or accepting a bill  
change in payment, according to the contract of  
goods sold and delivered, and for the price of  
the goods to be paid in money."] Those are  
counts of the same contract in different ways, but  
there is only one statement of facts upon which  
the plaintiff claims the toll, either as a metage or as a  
duty. In the former action of *Jenkins v. Harvey*  
there were numerous counts varying the mode of  
the right to the two duties, but the effect of  
the rules has been to reduce each class to one



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If she brought an action for the metage duty, and was defeated, she might bring another action afterwards for the port duty.] If the verdict in one action would not be a bar to the other, that is a fair test to show that the counts are not for the same subject-matter of complaint. It would be a hardship on the plaintiff to confine her to the first count, for the jury might be of opinion that the toll was a port duty, and then she would be nonsuited. There does not seem to be any thing to prevent the plaintiff from bringing actions for both duties, and if so, there is no objection to her claiming both in the same declaration. It is apprehended that the intention of the new rule is to restrict the plaintiff to one count in those cases only where the judge may amend if the statement of facts is wrong, but it is submitted that the judge could not amend a metage into a port duty, or *vice versa*. [*Parke B.* The argument on the other side is, that the claim in the first count arises on an implied contract, the consideration for which is the metage of the coals, and that the second count is only a varied form of the same implied contract. If you look at the examples given in the new rules, in which different counts are to be allowed, you will find that you could not recover both sums claimed, although they are not the same sums; as, for instance, on counts upon a bill of exchange, and the consideration for which it is given, or for freight upon a charter-party, and freight *pro rata itineris*. The same observation applies to the case recently decided in this court, *Thoroton v. Whitehead* (a), where we held that a count for double rent in the 14 G. 2. c. 19. s. 18., may be joined with a count for use and occupation. In the present action the sum claimed

(a) See *ante*, p. 313.

arising from the facts. It may be that the sums payable for freight upon a charter-party, and freight *pro rata itineris*, will vary in amount; but an allowance of different counts was not intended to be confined to such cases, but to extend to cases where, although the facts stated or claimed are the same in each count, yet different results of law may be implied. [Lord Abinger. There is an obvious distinction between a case where a plaintiff is seeking to recover a specific sum of money and one where he wishes to establish a right. The word "complaint" in the rule is rather a vague term.] In *Robner v. Ducar* (a), Tindal C. J. observes, that the object of these new rules was to prevent the pleadings from being loaded with unnecessary repetitions of facts, which were the same in effect, and addressed to the same ground of defence; not to prevent a party from putting in distinct answers to the same claim. "where there are distinct rights attaching to the same facts, and that is the meaning that ought to be attached to the words "distinct subject-matter of complaint."

*Idem* contra. It is not necessary to consider whether the new rules are to be construed with re-

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the plaintiff, that is no reason for varying the construction of the rule; but it is not, for the plaintiff have no difficulty in framing one count which will enable her to bring her claim before the court. The test proposed, whether the plaintiff could maintain a second action in case she was defeated in the first, affords no criterion for deciding the present case, which depends upon whether it is comprised in the exception to the rule. It is clear that it is not, and that it is quite distinct in principle from the instances given, which two counts are to be allowed. The counts in this declaration are just as much for the same subject-matter of complaint as counts upon a contract with and without a condition, which are not permitted. So in the second example given of the rule, counts for not giving a bill for goods sold, and for the price of the same goods, are not allowable, although the form of the two counts would be very different, the claim in the one arising upon a special agreement, and in the other on an implied contract [Parke B. Do you say, that a claim for toll thorough and toll traverse cannot be joined?] It is apprehended, that if the claim is in respect of the same subject-matter they could not. [Parke B. Another instance may be put of market toll and stallage.] If there had been an intention to except the present case from the rule, the words "distinct right" would have been used. [Parke B. If there is a distinct right, there is not a distinct subject-matter of complaint? The examples given in the new rules where two counts are not to be allowed, are either express contracts, or contracts to be implied from the conduct of the parties. All the instances for not delivering bills, &c. are of that kind. Here the plaintiff claims in respect of different rights, arising either from immemorial usage, from a grant of the crown.] A right is the title which the party to sue on a particular state of facts; then

no distinction between a right derived from the crown, and one springing out of a personal contract, and the court ought not to deal with them in a different way. But this is not a case of different rights, arising on the same statement of facts. Where a party urges a claim, he founds it upon facts which are necessarily varied, if he advances another claim. [*Parke B.* The same difficulty which arises on this declaration, might occur in a plea.] There is a difference with respect to pleas, for inconsistent pleas may be pleaded together, as in the case that has been cited, *Triebner v. Duear*. By the rule in actions for nonfeazance, several counts founded on varied statements of the same duty are not allowed; although when varied in statement it would amount to a different duty.

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LORD ABINGER C. B.—If the new rule had given us a discretion, I should, in the present case, have been disposed to allow both counts to remain in this declaration; but it is peremptory, and after a good deal of consideration, we do not see how we can permit two counts on the same implied contract. Therefore, whatever inconvenience may result to the plaintiff, we conceive we are bound to adhere to the rule, which, if found to be injurious, may be altered hereafter. It seems to me that Mr. *Crowder* has brought the case within it.

PARKE B.—It appears to me also that this case has been brought within the rule. When analysed, the claims set up in the two counts arise from the same grant of the crown, and they are only two varied modes of stating the consideration for such grant. This is, therefore, in substance a statement of the same grant in different ways, both counts being founded on the same subject-matter of complaint. Whether

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or not an amendment ought to be allowed at the trial is another question. If it should turn out that the first count cannot be sustained, speaking for myself, I should say, that I would allow an amendment. It would be a very great hardship if such amendment were not permitted.

BOLLAND and GURNEY B's. concurred.

A discussion afterwards arose with respect to costs and whether the court had power to make any order in the case, or it should be sent back to the judge at chambers, with an intimation of the opinion of the court. The rule was ultimately made absolute for striking out one of the counts with the costs of striking it out unless the judge, on a reference back to him, should exercise the discretion given him by the rule, of allowing both counts, upon the plaintiff undertaking to give distinct evidence in support of each count.

Rule accordingly.

BERRINGTON and Another *against* PHILLIPS.

The plaintiffs, who were attorneys, delivered a signed bill, and afterwards made a demand

**T**HIS was an action by the plaintiffs, who were attorneys, to recover the amount of their bill for business done up to the month of *August* 1831.

of the amount, giving notice that they should claim interest from that time pursuant to the 3 & 4 *Will.* 4. c. 42. s. 28. They subsequently commenced an action, and the bill was referred for taxation without any terms being imposed that they should be paid interest. The master not having allowed them interest, they applied for an order that it might be taxed to them, the judge at chambers refused to make the order, upon which they moved the court for a writ of inquiry to the sheriff to assess them such interest:—Held, that the plaintiffs ought to have made it a condition, on referring the bill to be taxed, that interest was to be paid, and not having done so, that they were precluded from afterwards claiming it.

red that they delivered a signed bill in *Novem-*  
*1833*, and on the *22d December* made a demand  
 e amount, giving notice that they should claim in-  
 t from that date, pursuant to the *3 & 4 Will. 4. c.*  
*.28.* The writ of summons was sued out on the  
*June 1834.* The bill was afterwards, at the in-  
 e of the defendant, referred for taxation to the  
 er, who taxed the plaintiffs the amount of their  
 ges, but without interest. They then applied to  
*and B.* at chambers, for an order to the master to  
 r them interest upon their bill from the time of its  
 g demanded, who refused to make the order, as  
 statute only empowers a *jury* to give interest.

*laule* now moved, on behalf of the plaintiffs, for a  
 to show cause why a writ of inquiry should not  
 e to the sheriff of *Glamorganshire*, directing him to  
 anel a jury, under the *3 & 4 Will. 4. c. 42. s. 28.*  
 mess the plaintiffs interest upon the judgment  
 ch had been entered up for them in the action.  
*derson B.* Your application is, that the sheriff's  
 shall only entertain the question as to the amount  
 interest. The difficulty is, whether, when you  
 mit the bill for taxation under the order of a judge,  
 matter is not at an end. After the plaintiffs had  
 ight their action, they ought to have made it a  
 ulation, on referring the bill for taxation, that inter-  
 should be paid; they however agreed to the order  
 ization without imposing any condition. [*Parke*  
 What were the terms of the order?] It was the  
 non order, but it was made after interest had been  
 ended. Final judgment was entered up in the  
 1. [*Parke B.* Then it must have been one of  
 erms of the order, that judgment should be so  
 ed up, as otherwise you could not have done it.]  
 rovisions of the *3 & 4 Will. 4. c. 42. s. 28.* ought

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unto his friends *William Toldervy* and *Thomas Davies*, their heirs and assigns, all his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of *Hereford* and elsewhere, “ upon the trusts and subject to the powers, provisoes, and limitations thereafter expressed and declared of and concerning the same ; (that is to say,) in the first place, to the intent and purpose that my daughter *Mallett* shall from time to time, till she shall have attained the age of twenty-one years, if sole and unmarried, have, receive, and take annually out of the rents and profits of the said premises one annuity or yearly sum of 60*l.*, to be paid to her by the said *William Toldervy* and *Thomas Davies*, their heirs and assigns, by four even and equal portions, at or upon four days in every year, (that is to say,) &c. : and to the further intent that my said daughter *Mallett* may from time to time thereafter, and until she shall have attained the age of thirty-one years, if she shall so long remain sole and unmarried, have, receive, and take out of the rents, issues, and profits of the said premises one further or other annuity or sum of 40*l.*, to be paid and payable to her by the said *William Toldervy* and *Thomas Davies*, or the survivor of them, or the heirs and assigns of such survivor, &c. But it is my will, and I do hereby declare, that in case my said daughter *Mallett* shall, either before she shall have attained the age of thirty-one years, or afterwards, marry without the consent of the said *William Toldervy*, if living, and, after his decease, without the consent of the said *Thomas Davies* first had and obtained in writing, under the hands and seals of them respectively, then she shall be paid, for and during the term of her natural life only, one annuity or yearly sum of 50*l.*, and not the other annuities, or either of them ; and from and immediately after the marriage of my said daughter, without such consent as aforesaid, I will, direct, and devise

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that all the said freehold messuages, lands, tenements and hereditaments, with their and every of their tenancies, shall be in trust for all and every the children of the said *Mallett*, lawfully to be begotten, in such shares and proportions, manner and form, as the said *William Toldervy* and *Thomas Davison* the survivor of them, or the heir of such survivor shall from time to time direct and appoint," and in default of appointment the testator directed that the said freehold lands and hereditaments should be in trust for all the children of *Mallett*, as tenants in common in tail, with cross-remainders between them, if but one child, in trust for such surviving child in tail, "and in default of such issue, the said freehold messuages, lands, tenements, hereditaments and premises, for my sister *Lady Frances Burrard*, assigns, for and during the term of her natural life, and from and immediately after her decease for the use of my sister *Sarah*, the wife of the said *William Toldervy*, and her heirs and assigns for ever; and as to the other moiety of the said freehold messuages, lands, tenements, and hereditaments and appurtenances, in trust for the use of the said *Toldervy*, her heirs and assigns for ever." The testator then devised certain leasehold hereditaments to trustees, upon the same trusts and without any limitations as he had declared concerning the freehold estate, or as near thereto as the difference between the respective properties would permit. The testator then made this provision; "provided always, and it is my will, that in case my said daughter shall in the lifetime of the said *William Toldervy* marry with his consent and approbation, or after his decease with the consent and approbation of the said trustees, or the legal representative of the said trustees, then and in such case it shall and it



them, or the survivor of them, or the legal representative of the survivor of them, to convey the said freehold messuages, lands, tenements, and hereditaments, and to assign the said leasehold messuages, lands, tenements, and premises, unto such person and persons' use and uses, as they, or the survivor of them, or the legal representative of the survivor of them, shall think proper; *so that* the same is conveyed and assigned upon trust only, and for the use of my said daughter *Mallett*, and such husband as she shall marry with such consent as aforesaid, for and during their joint lives, and the life of the survivor of them, but not without impeachment of waste, with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions as they my said trustees, or the survivor of them, shall think proper, direct, and appoint; and for want of such direction, limitation, or appointment, in such shares and proportions as hereinbefore limited respecting the same." The testator then directed an additional allowance to be made to his daughter, at the discretion of his trustees, by paying her all the rents and profits, or any part thereof, until she should attain the age of thirty-one, and if she so long remained sole and unmarried. He then provided for the maintenance of his daughter's children in case she married without consent; and then reciting that he was entitled to the remainder in fee of certain hereditaments in *Whitechapel*, he gave and devised the same unto his sisters *Lady Frances Burrard* and *Sarah Toldervy*, and to the heirs and assigns of the said *Sarah Toldervy*. The testator died in 1776 without revoking his will, leaving his two sisters surviving, as also his daughter *Mallett*, his only child and heiress at law. Between the age of 21 and 31 she married the *Rev. James Colt*, with consent of *William Toldervy*. Shortly before, and in contemplation of the marriage, the trustees *Toldervy* and *Davies*, by deed of release

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and assignment, after reciting, among other things, the will and mortgage, and the fact that considerable accumulations had been made of the rents and profits of the devised hereditaments, which had been invested in the government funds, and in consideration of the said marriage, and in compliance with the request of the said *Mallett Clarke*, and in conformity with the testator's directions in his will, and with the privity of said *James Colt*, bargained, sold, and released the devised hereditaments to certain other persons and their heirs for ever, subject to a mortgage created by the testator upon the trusts of the will till the marriage, and after it, to the use of the husband and wife for their joint lives and the life of the survivor, with impeachment of waste, with remainders to trustees to preserve contingent remainders, and to the children of the marriage as tenants in common in tail, and reservation of power to mortgage in order to pay off the mortgage.

*William Toldervy* died in 1790, leaving the said *Sarah Toldervy* him surviving, and also *Thomas Davies* his co-trustee. *Sarah Toldervy* survived her sister *Lady Frances Burrard*, and in March 1799 devised all her lands to *James Bayley Toldervy* in fee, and died 21 January 1800, without having revoked her will, leaving *James Bayley Toldervy* her surviving. She had issue *Jane* and *Frances* by one marriage, and *James Bayley Toldervy*, the younger, *William Francis*, *Thomas James*, *Henry Spencer*, and *Anna* by another. By lease and release of 4 June 1816, reciting that the said *James Bayley Toldervy* was by the last stated will entitled to the remainder in fee expectant on the death of the survivor of the said *James Colt* and *Mallett* his wife, without issue, of and in the freehold hereditaments hereinbefore mentioned, *James Bayley Toldervy* bargained, sold, and released to *T. J.* and *B. C.*, their heirs and assigns, all the hereditaments which were theretofore the estate of *James Bayley Clarke* deceased, and

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of which he died seised, and devised by his will, on trust to sell the same and pay the dividends to *James Bayley Toldervy* for life, and after his decease to the plaintiff during her life, and after the decease of the survivor to divide the trust-fund among the seven children of the said *James Bayley Toldervy* (the defendants) in equal shares.

The trustee *Thomas Davies* afterwards died, leaving the defendant *William Davies* his heir at law. Mrs. *Colt* pre-deceased her husband, having never had any issue. On Mr. *Colt's* death in 1832, his nephew, the defendant *Sir John Dutton Colt*, took possession of the property, claiming by devise from Mr. *Colt*, a fine having been levied of the property by Mrs. *Colt* and himself in her lifetime. The present bill was filed by the widow of *James Bayley Toldervy* against *Sir John Dutton Colt*, and against *William Davies* and *Henry James*, the heirs at law of the surviving trustees of the wills of the original testator and of *James Bayley Toldervy*, and against his children, and prayed delivery of the possession of the property and title deeds to the plaintiff, as well as an account of the rents received since the death Mr. *Colt*, and that a receiver might be appointed; and charged, that on the death of the Rev. Mr. *Colt* in 1832 the equitable estates in the said hereditaments vested in the trustees of *James Bayley Toldervy*, subject to the trusts declared concerning the same by indenture of 4 June 1816, in favour of the plaintiff and the defendants, the children of *John Bayley Toldervy*. The legal estate was still outstanding in parties entitled to the mortgage of the original testator.

This case came before the Lord Chief Baron sitting in equity, on a motion to compel the defendant, *Sir John Dutton Colt*, to produce certain deeds relating to the property (a), the possession of which he admitted by

(a) See 1 Youngs & Coll. R. 240.

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be presumed to have been in the contemplation of the testator, who had by such devise of the fee expressed his intention of disposing of the whole of his estate among the objects of his bounty. Under these circumstances, the legal intendment in favour of the heir is excluded, —he is denuded of the legal estate; and the will is to be construed as any other instrument would be for the purpose of ascertaining the intention of the testator, to which it had been subjected by devising it away from the heir, with one restriction only, that is, that the reasonable inference from such a mode of dealing with the legal estate was, that the heir should take only so much as was given to him by the will; and the court will not lean in favour of a resulting trust against a clear intention to dispose of the whole estate. Whatever may be the strict grammatical construction of the words of a will, that is not to govern if an intention of the testator which is consistent with the rules of law, or settled rules of construction, requires a different construction; and this whether the testamentary disposition be such as the court will favour or not, *Thellusson v. Woodford* (a). In *Sherratt v. Bentley* (b) Sir John Leach, M. R. says of an inaccurate will, “it is impossible to give effect to every expression used by this testator, several of those expressions being necessarily inconsistent with each other. There are, however, two principles of construction, upon which it appears to me that a court may come to a conclusion without the necessity which, if possible, is always to be avoided, of declaring the will void for uncertainty. First, if the general intention of the testator can be collected upon the whole will, particular terms used, which are inconsistent with that intention, may be rejected as introduced by mistake or ignorance on the part of the testator as to the force of the words used; secondly, where the latter part of the

(a) 4 Ves. J. 311; 11 Vesey, 141, S. C. Dom. Proc.; see 1 Ball & B. 479, 480.

(b) 2 Mylne & Keen, 156.

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will is inconsistent with a prior part, the latter part of it will must prevail." And the words "executors, administrators, and assigns," were there rejected accordingly. The court, therefore, must first seek for the general intention of the testator apparent on the face of his will, in order, secondly, to guide their construction of it by applying that general intention to it; and, thirdly, to give effect to his general intention, collected from the whole will taken together (*a*), with reference to the state of his family at the time, in preference to any particular intention gathered from detached clauses only. This testator having a young unmarried daughter and two sisters, one a widow, the other married with family, feared his daughter's imprudent marriage, and intended to give her an estate for life, with a remainder for life to her husband, if she complied with the directions of his will, and in any event, to provide for his issue by giving them estates tail; and in default of such issue to provide for his widow sister by giving her an estate for life in one moiety, and, subject thereto, devising the estates to his married sister Mrs. *Toldervy* in fee.

The will makes a complete provision for his family in either alternative of marriage. By the first clause in case the daughter married without consent, the estate was to be in trust for the children immediately after her marriage, subject only to an annuity; and by introducing into this part of the limitations the proviso (which is in its nature to be applied whenever it is applicable, and not like a limitation, according to its place in the document,) that in case the daughter contracted a marriage suitable in the testator's apprehension by obtaining the consent of the trustee, she was rewarded with an estate for life, and the testator contemplated that a proper husband might be induced to enter into the marriage by the expectation of a

(*a*) *Crone v. Odell*, 1 Brod. & B. 480.

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The testator contemplated three classes of his relations; first, his daughter, to whom he limits an amount of estate, according to her marrying with or without consent of his trustees; secondly, the expected children of his daughter; and thirdly, his sisters. These latter classes were ranked equally in his bounty, whether his daughter married prudently or not. By giving the husband of *Mallet Clarke* an estate for life in case he survived her, he afforded her the means of making a suitable match. The subsequent proviso was added for the specific object of modifying the previous limitation which the testator considered to be fixed. This case resembles *Mackinnon v. Sewell* (a).

*Knight, Preston* and *C. P. Cooper* for the defendant *Sir John Colt*. Under this will the remainder given to the testator's sister, *Mrs. Toldervy*, only vested in her, in the event of his daughter marrying without the specified consent, and dying childless. That marriage without consent formed a condition precedent and not having taken place, the remainder to the sister has failed of effect. The court cannot depart from the grammatical construction of the language of a will except in case of evident necessity, clearly arising from the apparent intent of the testator. [*Parke* B. The language in which I have found that rule stated is thus used by Mr. Justice *Burton*, in *Warburton v. Loveland and Ivie* (b), which afterwards came to the House of Lords.] The intention to make a will is not inconsistent

(a) 2 Mylne & Keen, 202.

(b) In Exchequer Chamber in *Ireland*, in error from the Court of Exchequer, 1 Hudson & Brook's Rep. 623, 648, viz. "I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention or any declared purpose of the statute, if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no farther."

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tent with a design to die intestate as to a part, particularly where, as in this case, the party who would take as heiress in case of a partial intestacy is noticed in the will as an object of affection. The testator's sole intention was to protect his daughter from fortune-hunters. If it is said that he had merely an equitable fee, *Jervoise v. Duke of Northumberland* (a) shows that it makes no difference in construing the limitation whether he had the legal or only the equitable fee. Lord *Eldon* was there of opinion, that where there is an executory trust by which the testator directs something to be done by his trustees, without himself completing the devise in question, the court will look at his intention; and if what he has done be imperfect with respect to the execution, will inquire what it is itself to do, and will mould what remains to be done so as to execute that intention; then, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same, whether the estate be equitable or legal. Lord *Eldon* there assents in the fullest terms to Mr. *Fearne's* position, in his *Essay on Contingent Remainders* (b). In *Sanders on Uses*, 269, (3d edit.), the maxim is laid down, that in the construction of limitations in a trust, either of real or personal estate, courts of equity adopt the rules of law applicable to the construction of limitations of a legal estate.

The question whether a condition or contingency which affects one set of a series of limitations is or is not to be carried on to other or subsequent limitations in the series, and which has been ably debated in many cases, and by several text writers, arises here. Mr. Justice *Bayley* gives the key to all the cases in *Warter v. Hutchinson* (c), where he says, that in *Doe v. Shipp-*

(a) 1 Jac. & W. 569, *et seq.*(b) Page 141, *et seq.* 8th edit.

(c) 1 B. &amp; Cr. 749.

twenty-one; and yet not so to give it, if no  
d survived its mother. That case depended  
stator's having given an estate over on failure  
ceding limitation. The testatrix there had  
d events on which the preceding limitation  
il;" but not having foreseen them all, the  
failed, though not in the way contemplated by

But no reasonable doubt of the testator's  
could there be entertained, and the case,  
ood law, does not apply here. The testator in-  
die partially intestate as to the accumulations  
and profits, if the whole were not allowed her  
stees, or if she married without consent; and  
ultimate fee, if she married with consent, or  
single after thirty-one, she would then take  
at law by resulting trust, *Gibson v. Mount-*

For if there is no such partial intestacy, then  
; *Mallett Clarke* to have remained unmarried  
one, there is no further provision for her by the  
supposing that she having married previously  
ent of the trustees, they had neglected to make  
nt according to their power in the will, her  
hat marriage could not take as against the  
sisters, while all the issue of repeated unworthy  
must do so. Had Mr. *Colt* died directly

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consent, she had some power to dispose of the ultimate fee by levying a fine, and it was only in the event of her marrying without consent that the estate would become subject to a series of limitations, which would exhaust the fee, and give it to the testator's sisters. Transposition of words will not be allowed in a will, particularly from one sentence to another, if the object be to disinherit an heir at law. The contingency of *Mallett Clarke's* marrying without consent, not only overrides the subsequent limitation to the sisters of the testator in grammatical construction, as no good reason is shown on the other side for not adhering to it, but on legal principle to be deduced from *Davis v. Norton* (a), *Fearne* (b) in noticing that case says, "the construction in these cases as to the restriction of the contingency to the estate first hinged upon it, seems to depend on the testator's apparent intention not to extend it further. For wherever there is no apparent distinction in view in this respect, between such estate and those which follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations. *Doe v. Shipphard* (c) also tests this rule. *Dean v. Bagshaw* (d), *Doo v. Brabant* (e), *Williams v. Chitty* (f), *Holmes v. Craddock* (g), and *Parsons v. Parsons* (h); are instances to show that judges, however unwillingly as against probable implication, adhere to the express words of wills, where the limitations depend on contingencies which do not happen, while the actual event is left unprovided for. The first case affords a cogent example, for the heir was disinherited by enforcing the terms of such a will; though as the Master of the Rolls says of that decision, in *Parsons v. Parsons*, nothing could be more repugnant to what must be supposed the

(a) 2 Peere Wms. 390.

(c) Doug. 75.

(e) 3 Brown's Ch. C. 393; *Thurlow C.*

(g) Id. 236, 536.

(b) 8 ed. 235, 236.

(d) 6 T. R. 512.

(f) 3 Ves. 545.

(h) 5 Ves. J. 582.

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will. The contingency on which the will turned was annexed to a particular gift, for a reason personal to the estate tail; so that as the estate tail failed by unforeseen death under twenty-one, the remainder over took effect. Sir *W. Grant's* judgment in *Simpson v. Vickers* (a) is in point; as is *Humberstone v. Stanton* (b). Now in this case the wording is all in favour of the daughter, for the testator has said in so many words, "I give nothing to my collateral relatives, unless the marriage be without consent as well as childless. *Clarke v. Parker* (c) shows, that had the trustee *Toldervy* refused his consent to a proper marriage in order to benefit his own wife and children, equity would have relieved.

*Temple* in reply. The trustees' power to convey was coupled with a trust; so that they might have been compelled in equity to settle the property pursuant to the direction of the will, in case of the daughter's marrying with the requisite consent (d). The defendant's construction is not set up as the necessary implication appearing from the will and the situation of the family, but as an absolute necessity, which must be enforced by the court in favour of the daughter as heiress at law. Lord *Eldon*, in *Booth v. Blundell* (e), shows that to be a loose expression. This is not an executed but an executory trust. The resulting trust would not be of the corpus of the estate, but of the surplus rents undisposed of by the will. The testator's object was to give his daughter a limited estate, and to secure the fee to all the issue she might have, or, failing them, to his sisters, so as to prevent the fee from going to a stranger in blood, as it has done; for *Sir John Dutton Colt* claims not under the disposition

(a) 14 Vesey, 341.

(b) 1 Ves. &amp; B. 385.

(c) 19 Ves. 18, 22.

(d) Sugden on Powers, 5th edit. 405.

(e) 1 Meriv. 219, 220.

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of the daughter, but by devise from her husband Mr. *Colt*, who had levied a fine, and obtained her to join as a cognisor. In the cases cited on the other side, the express words of the will prevented the bare question of the testator's intention from arising as in this case. This testator clearly meant to devise that absolute fee to all the remotest issue of his daughter, and on failure, to his sisters, as his eventual heiresses at law.

*Cur. adv. vult.*

Judgment was delivered on the 26th *February* at the equity sittings in *Gray's Inn Hall*, by

LORD ABINGER C. B.—The will in this case is, without doubt, obscure and of difficult construction. The inclination of my opinion was in favour of the plaintiff, but I pronounced no judgment upon it until I had consulted another member of the court, (my brother *Parke*,) to whom I sent the will, without any comment or suggestion of my own opinion. He returned it to me in a few days, confirming my previous impression; in consequence of which I delivered my judgment, that upon the death of the testator's daughter without issue of her marriage, the plaintiff was entitled to the estate. The case was afterwards revived upon a motion for a receiver, and as upon that occasion the will was to be discussed, and the plaintiff's title to come under consideration a second time, I thought it more expedient that it should be argued before the full court, in order to receive the aid of the other judges. Upon that occasion the case underwent a very deliberate and solemn discussion, during which the court found great reason to entertain obligation to the counsel on both sides, for their very able, elaborate, and ingenious arguments. Much new light was then thrown upon the subject, and some circumstances in

has also found reason to change the opinion he  
ined before hearing the argument; and I will  
ate the unanimous judgment of the court in  
of the defendants upon this motion.

At the first occasion it occurred to me that the  
' could not doubt, nor do I now doubt, that if  
ntion had been called to the particular case which  
fact occurred, and has thus given rise to this  
n, he would have declared his intention to be in  
of his sisters. The will continues so obscure in  
rehension, that the opinion which we are bound  
re at upon it, never can be one of great con-  
, though we must deliver that which appears to  
t justified by the argument. Now the will is  
uch disjointed, the clauses are thrown about in  
eat confusion; but, in order to make them in-  
le, the best mode is to collect the different  
rs of it, and place them together. I have taken  
ains to do that and to abbreviate them. It  
s to me, that after abstracting the will, and  
, together the different clauses, provisoes, and  
ions which are strewed in different parts of it,  
ll assume something of this form. The testator,  
*George Bowman Clarke*, bequeathed the whole of  
ate, both real, leasehold, and personal, to *Tol-*  
*and Daniel* whom he made his executors. and

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time to deposit them in the bank of *England*. In short they had undoubtedly very great powers over this estate, and were declared to be in trust for the object of the will, which are stated to be these: "to the intent and purpose that his only child, his daughter *Mallett*, shall till 21, if sole and unmarried, receive an annual sum of 60*l.*, and from time to time thereafter till she shall attain the age of 31, being still sole and unmarried, receive an additional annuity of 40*l.*" Then there comes, very much disjointed from that bequest, at a remoter part of the will, this proviso: "provided, that the trustees shall be authorized and empowered, not only during her minority, but at any time or times afterwards, till she arrives at the age of 31, and so long as she is unmarried, *but not otherwise*, as they shall think fit, to pay and apply any further sums beyond the two annuities of 60*l.* and 40*l.* for her maintenance and education or her advantage, so as they do not exceed the amount of the annual rents and profits." So that in effect this was giving to her these annuities at all events till she arrives at the age of 31, unmarried, at the discretion of the trustees, giving her the benefit of the whole of the rents and profits till she comes to that age, if she remains unmarried, *but not otherwise*. Those last words are very important, because it shows that if she remained unmarried they had no right to give her more than what was afterwards provided for her. Then there is one proviso in the will, "if my daughter shall, either before or after 31, marry without the consent of the trustees, or the survivor of them she shall be paid an annuity for her life only of 50*l.* and not the other two of 60*l.* or 40*l.* before-mentioned and from and immediately after the marriage of a daughter, without such consent as aforesaid, I direct that the said freehold messuages, &c.—(the first clause relates to the real estate, but the subsequent parts of the will throw together the whole, and therefore I con-

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prise the whole in one statement,)—there shall be in trust for all and every the child and children of the body of my daughter, lawfully to be begotten, in such shares and proportions, manner and form, as the trustees shall from time to time direct or appoint, with or without power of revocation; and, in want of such direction, in trust for such child or children, equally to be divided between them as tenants in common, and the several respective heirs of the body of such child and children lawfully issuing, with cross remainders among them; if but one such child, then to that child alone:—(here I insert a proviso again, which is thrown into the further part of the will;)—and in case my daughter shall marry without such consent, and have issue of her body, I direct and empower my trustees, or the survivor of them, to lay out and expend all or such parts of the rents and profits of the estate devised, which shall remain to be received after payment of the said annuity of 50*l.* to my daughter, in the maintenance and education, the putting out as apprentice, or otherwise providing for the issue of my daughter during her life.” That is, that the persons to whom he gave the estate-tail should have, during their minority, a provision, at the discretion of the trustees, out of the estate which he bequeathed to them, and until they should be respectively entitled to their respective shares of the property under his will. Now these are the important parts of the will, with the exception of a proviso for the case of her marriage *with* consent, to which I will advert presently. That proviso is thrown into a remote part of the will also, and appears to give the trustees a power to convey the estate to new trustees for the purposes in that proviso mentioned. If the trustees had made that conveyance, the effect would be to give an estate for life, with the benefit of survivorship, to the husband and the wife, and an estate tail afterwards, not to one, but to all the issue of the body

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of the wife, so as to make them tenants in common as purchasers, though in such shares as the trustee choose to appoint; and if the trustees should make an appointment, then to them in like manner as before. But that clause is not followed by any declaration of a limitation of the remainder after that estate takes effect. Now, upon the first argument, it had occurred to me that the testator's intention was pretty apparent in his will to provide for the sisters who have the remainder. I believe I ought to mention, that the remainder, on the bequest of the first estate tail, is to the two sisters after the failure of issue of the children of *Maria Clarke*. I thought he had a design to provide for his sisters by this estate in remainder at all events, although it was ambiguously expressed. It had occurred to me, that putting the proviso for the case of a marriage with consent into its proper place, which I thought I could discover, removed all difficulties, and made the remainder take effect after the estate tail given to the children, either in case of a marriage without or marriage with consent. That was the impression under which I certainly gave my first opinion; but, on the elaborate arguments which we have since heard, I have seen reason to change it. Let us see what is that the children take. The estate is given to them expressly in case of a marriage without consent; the remainder is to take effect after that estate expires and dependant upon that estate and no other. This is the first remainder, and begins in these words: "a remainder in default of such issue." Now it is admitted on both sides, and I think it cannot be denied, that that mean in default of issue of the children; it cannot mean in default of issue of the daughter, because no estate is given to the daughter, nor, in that clause, any estate for life, and therefore a limitation to the sisters after general failure of issue of a person who was to take a particular interest, would have been too remote; I

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what is given to the daughter is an annuity of 50*l.* a-year in case of her marriage without consent. That is all the interest she has, and immediately the children are born they take estates tail, liable to be modified by any direction or appointment the trustees might make. If they made no appointment, they took estates tail as tenants in common with cross-remainders. Upon what then does the remainder to the sisters depend? It depends upon that estate tail, and if that is taken away, the remainder is taken away. The question has been argued on behalf of the plaintiff, as if the case ought to be ranged under that class, to which it is contended that the case of *Murray v. Jones* and *Fawcett v. Jones* and that of *Sewell v. M'Kinnon*, of more modern date, belong. It has been said that those cases are authority to show, that in cases where it is contrary to the apparent intention of the testator, the Court will not allow a condition which in words may appear to be a preliminary condition, or vesting the estate, to operate upon all the limitations following that condition. Now it appears to me that that is not the true character of those cases. They do not furnish questions upon the operation of a condition upon subsequent limitations, but are mere constructions of the condition itself. The case of *Murray v. Jones* is that of the will of Lady Bath, in which the person who drew her will used a multitude of unnecessary words for the purpose of giving to Mrs. *Fawcett* her personal estate in case Lady Bath should not have any second child that arrived at the age of 21, or, being a daughter, married before that age. The words used are exceedingly complex, for I think they began by stating, that in case she should have a son born and daughters, and the daughters should not marry before 21, or in case she should have a daughter born and sons, or in case she should have both sons and daughters, so that the person who drew the will has perplexed himself by putting all possible



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cases when he meant to state only one; that in ca  
 she should have no second child that should arrive  
 the age of 21, or daughter who should marry before th  
 age. Sir *William Grant*, who decided that case, put  
 I think, upon the true ground; he said it was meant  
 give the estate to Mrs. *Fawcett* and her children, in ca  
 the testatrix should have no daughter or son that arriv  
 at the age of 21. Why, she had no children at all, the  
 fore she had none that arrived at the age of 21; and  
 that account he interpreted the condition, however c  
 scurely expressed, only to mean, if she should die wi  
 out leaving any children: and he made use of this m  
 markable expression, that if there were any gradatio  
 in the performance of the condition, she had more th  
 performed it; for whereas she meant to give the est  
 over if she had no child that arrived at the age of 21  
 that as she had left behind her no child at all, the  
 fore she could not have one that arrived at the age  
 21; and he illustrated that further by showing, that  
 another part of the will, in declaring who should be th  
 ultimate object of her bounty after Mrs. *Fawcett* an  
 her children, in case they failed to exist, she made  
 provision, if she herself should leave no children b  
 hind her, and Mrs. *Fawcett* should leave no childr  
 behind her, that then the estate should go to a thi  
 party. That clearly shows her intention was to gi  
 the estate to Mrs. *Fawcett* and her family, in case sh  
 Lady *Bath*, should die without leaving any childre  
 therefore it is perfectly plain that was the interp  
 tation of the condition itself, showing what the co  
 dition meant, and no question could arise of a conditi  
 operating upon a subsequent limitation. The conditi  
 did operate upon a subsequent limitation, and was wi  
 the Master of the Rolls interpreted it to be, and i  
 that which it had been contended to be, viz. that it w  
 part of the condition that she, Lady *Bath*, should

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tally leave a child living after her death. The case of *M'Kinnon v. Sewell* was exactly of the same nature, and therefore requires no further observation. On the other side, it was argued for the defendant, that this case ranged itself under that class of cases in which a rule of construction, founded on plain common sense, has been illustrated, viz. that where a condition precedes a certain series of limitations, that each of that series must be taken to be affected by that condition, unless there is a manifest intention upon the face of the will to be collected to the contrary; that is to say, in other words, you must follow the plain grammatical construction of the will in giving effect to the limitations, unless you find by some other parts of it that the testator's intention was to deviate in any one particular from that plain grammatical construction. The question then is, whether in the will the condition upon which the estate tail is limited to the children, does not also apply to the limitation in remainder to the sisters? It appears to me upon the words that it clearly does; but I think it is hardly necessary to go into that class of cases to determine the construction of the will as far as it depends on that first and second limitation, because, as I said just now, the estate tail is given to vest in the children immediately that they are born, and is given upon the express condition of the marriage of the mother without consent, and therefore the remainder over is made to depend upon that estate tail. Why then, if you take that estate tail away, what becomes of the remainder? If it were legitimate to transfer the proviso for a marriage with consent immediately after the limitation to the children upon a marriage without consent, and to make it part of the same sentence, then undoubtedly the limitation to the sisters over would depend upon the one estate tail as well as upon the other, which is given afterwards upon the second pro-

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viso; and if it depended only upon that power, I should have had some courage to say, that in order to meet the apparent intention of the testator, I should have been disposed to have transferred the proviso in this manner, under the authority of several cases we known to gentlemen who are in the habit of considering these subjects, in which the opinion rather widely laid down by Mr. Justice *Buller* has however been acted upon, where he says in *Doe v. Wilkinson* (that the court may mould and transpose the clauses of a will for the purpose of giving effect to the intention of the testator; but I find a clear case in this will in which the sisters could by no means have any remainders at all, which is this: The testator has provided for his daughter till she arrives at the age of 31 if unmarried, and has provided for her also if she marries before or after 31; but if she remains single from 31 to the day of her death, the only provision made for her is that made by law, for there is none by this will. I was argued in that case, that he must be supposed to intend to die intestate. I do not think he intended any such thing, but a man may, without intending to die intestate, in effect make no provision at all but that which the law makes; it appears to me a confusion of ideas to say, that a man means to die intestate when he makes a will, because he probably means to devise every thing; but it happens very often that he omits to make a particular devise and if it is a *casus omissus*, a court of law cannot afterwards supply it. Now then, suppose the daughter had never married at all, why the object of the trust given to the trustees being to provide for particular persons, the daughter, her children, her husband, and in one case for the persons in remainder

who are specified in the will, if she does not marry at all and dies unmarried, there is an end of their trust, except that which the law raises for the benefit of the daughter. What estate does she take? not an estate for life; she takes no particular estate, and therefore no remainder can depend upon her life; she takes no estate tail, so that no remainder can depend upon that estate; she clearly takes an estate in fee, liable, if you please, to be divested by her marriage with or without consent after 31, but yet if she remains unmarried after 31, it is clear she would die seised of an equitable real estate in all these premises; and it goes therefore to her heir at law, or is bequeathed by her will. There is one case, therefore, where clearly the testator has omitted to make any provision for his sisters at all, or to give any such estate as could support any remainder to them. Then it is properly asked, as one case of that sort is manifest and incontrovertible, why should not the other case also, of a marriage with consent, be ranged under the same class of cases, either of a design to die intestate, if you please so to put it, or of a *casus omissus*: and why should you supply it in one case more than the other? It is very remarkable, that in the proviso for a marriage *with* consent, the estate tail is given to the children in a different manner. The first estate tail vests in them the moment they are born, they take as purchasers in both cases; but in the other, the estate is given to the husband and wife for life, and for the life of the survivor, and then the estate tail, depending upon that estate for life, goes to the children. Undoubtedly that would make no difference if it were followed, either in words or by construction, with a remainder over to the sisters; but that proviso for a marriage with consent, is followed by no such remainder to the sisters. Now where shall I put it in the will? what right have I to say, as I first

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thought I had, that I can put it before the limitation ~~of~~  
the remainder to the sisters? Suppose he himself had ~~had~~  
put it in the will at an earlier place, he might have put ~~it~~  
after that limitation. If he had put it next after, ~~there~~  
same difficulty would arise which now occurs, when it ~~is~~  
put at a greater distance. I cannot see clearly that ~~he~~  
intended that that limitation to the sisters of a remainder ~~on~~  
on a particular estate tail, granted upon a certain ~~on~~  
condition only, should follow the estate tail granted ~~and~~  
upon another condition and in a different part of ~~his~~  
will, he not having followed it out by stating any ~~re-~~  
mainder to the sisters after it. If I were asked, ~~what~~  
do you think would have been the intention of the ~~tes-~~  
tator if he had been told, "you have made a provision  
for your sisters in case of a particular marriage ~~with-~~  
out consent—but in the other parts of your will you  
have left no provision for them as to your estate  
bequeathed to your daughter"—I should think it very  
probable that he would have said, "fill up that omis-  
sion and give them the remainder again;" but ~~a~~  
court of justice has no right, in interpreting a will, ~~to~~  
make a probable conjecture of what a testator would ~~do~~  
have done in a particular case, and then to do it for him ~~if~~  
if there are no words in the will to justify it. We are ~~bound~~  
bound to find the intention of the testator, and though ~~it~~  
it be expressed obscurely or inaccurately, yet if it is  
expressed, either in words somehow or other, or by ~~so~~  
so strong an implication, that the object which he con-  
templated is plain, in that case we are bound to give  
effect to it, and very often so to mould and modify the  
estate as to give effect to the intention which he either  
has expressed, or clearly intended to express. On  
the other hand, if the words do not express any such  
intention, it is not because we can conjecture such in-  
tention to be highly probable, that we are to insert  
words in order to give effect to it. The testator has

not done what he probably would have done had the case occurred to him; but we have not on that account a right to do it for him. It therefore appears to me, that by nothing but a probable conjecture, which in my opinion we have no right to act upon, can we insert this proviso immediately before the limitation over of the remainder to the sisters; and if we cannot do that, then the limitation over to the sisters clearly depends upon the conditional estate tail given to the children; and as that conditional estate tail never existed in the case which has occurred, of course the remainder falls to the ground. I ought to state, that it is the opinion of some of the judges, and, for aught I know, all of them, certainly two have expressed it to me, that that proviso itself is not imperative upon the trustees. The proviso is, that it "shall and may be lawful," in case of a marriage with consent, for the trustees to convey and assign all the trust property to such new trustees as they should appoint, so that they conveyed it to the husband and wife for life, but not without impeachment of waste, and the survivor, and to the children, in such shares and proportions as they might deem expedient, and without any such direction to the children, in like manner as he has thereinbefore given it. I own, that I myself do not entirely concur in that opinion; I think myself, that although the words are put, "it shall and may be lawful," the trustees would probably have been compelled, if the case had arisen, to make that conveyance, or to have declined to hold the estate in trust for the children. That depends on a class of cases, of which *Brown v. Higgs* (a) is a leading case in modern times, and some cases of that sort before, and some after, where it is plain, I think, and cannot be doubted, that where an apparent power is

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(a) 8 Vesey, 570, 574. S. C. in Dom. Proc., 18 Ves. 192.

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combined with the trust and is not executed, a court of equity will execute the trust in some way. I therefore incline to think, that if the trustees, in case of children born after marriage with consent, had omitted to make any conveyance at all, a court of equity would have allowed the children to have had the benefit of that clause in the will, considering it as a trust combined with a power. However, the judgment of the court in favour of the defendants in this case, must be given without reference to that interpretation, because the other judges were undoubtedly of opinion that it was a matter of mere discretion in the trustees whether to create that estate tail or not. If they are right in that, *cadit questio*, and there can be no doubt at all that the plaintiff can have no claim; as no remainder is given after the estate tail which the trustees may or may not create. But we are all agreed that we must give judgment for the defendants upon the other ground: viz. that we cannot indulge in conjecture for the purpose of introducing a proviso into another place than that where it exists in the will, and in that precise place which would make it give effect to the limitation of the remainder to the sisters. Upon this ground the motion must be refused.

Bill dismissed without costs.

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LANE *against* THELWELL.

A count for  
goods sold and  
delivered,  
stating that

**A**SSUMPSIT. The declaration stated that the defendant, on the 24th October 1835, was indebted to the plaintiff in &c. for goods sold and delivered by the plaintiff to the defendant at his request, but not alleging the time when the goods were sold and delivered: Held good on special demurrer.

e sold and delivered; and that the time  
goods were sold and delivered ought to  
stated with certainty; and that at least the  
n" ought to have been inserted in the de-  
before the word "sold." Joinder in de-

in support of the demurrer. The declaration  
have averred when the goods were sold.  
decided last term, in *Ferguson v. Mitchell* (a)  
*v. Thebwell* (b), that a count upon an account  
bad for omitting the words "then and  
rather the word "then," inasmuch as now  
need be stated in the body of the declaration.  
le of *Trinity* term 1 W. 4., the declaration  
age that "the defendant on — was in-  
the plaintiff in £ — for the price and  
ods *then and there* bargained and sold," &c.,  
urt will not encourage a departure from the  
given, and which is moreover accordant with

For the rule laid down in *Comyns' Dig.*  
3. 19.) is, that the time of every fact ma-  
aintain the declaration ought to be alleged.  
time when the goods were sold is a more  
art of the declaration than the promise, for  
ould imply a promise from the fact of the



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delivered at or before the time when the defendant is stated to be indebted; and if so, the time is as distinctly stated as if it had been expressly set out; for *id certum est quod certum reddi potest*. Where a plaintiff alleges that on a given day the defendant was indebted to him, it must be in respect of some consideration which had arisen either before or at that time. It is admitted that the old form does not point out any particular time, and it is not affected by any of the new rules. Under the head already referred to in *Comyns Dig. Pleader* (C. 19.), several examples are given where the word "*postea*" has been held to be a sufficient allegation of time. In *Cutler v. Southern* (a) it was decided, that if a man pleads that before the obligation, *scilicet*, 1st October, and the day mentioned is after the obligation executed, the word "before" is sufficient, and the *scilicet* shall be rejected as repugnant, as well in case of a demurrer as after verdict.

*Addison* in reply. In the case last cited the objection was not pointed out on special demurrer.

LORD ABINGER C. B.—I do not think that it was intended by the forms given in the rule of *Trinity term* 1 W. 4. to introduce matter that was not absolutely necessary before, but rather to reject that which was not essential in the old forms. They certainly do not alter the laws of pleading, which the judges had no authority to do, but were intended to leave out as much of the old forms as was consistent with certainty. The question is, whether the form adopted in this declaration is sufficient, which is the same as if it had contained the words "before that time;" for the present objection might clearly have been urged if those words

(a) 1 Lev. 194.

an account stated has always been different.] *Denison v. Richardson* (a) shows that there must be an allegation of time to every material fact, for though it may not be traversable, it must be stated in the declaration. Several cases have already occurred in which pleadings have been held bad for not conforming to the new rules. For instance, in *Smedley v. Joyce* (b), a plea to a declaration in debt that the defendant "never did owe" instead of "never was indebted," was decided to be bad on special demurrer. [*Parke* B. That case arose upon a rule of court, which has the same authority as if it had been enacted by parliament. The rule framed by Lord *Tenterden* merely says, that if the forms there given are exceeded in length, the costs of the excess shall not be allowed on taxation. The only use that you can make of the form subjoined to that rule of a count for goods sold is, that it shows that the judges thought the time was material.]

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*Buoby* contra. If it be necessary to allege the time, it may be sufficiently collected from the declaration. With respect to the decisions that have been cited relating to an account stated, there is a clear distinction between them and the present case. In an account stated the party relies on one matter, and it is therefore only right that he should be bound to set out the time by reason of the singleness of the transaction; but in an action for goods sold and delivered, the plaintiff may give as many deliveries in evidence as the case comprises, unless the statute of limitations is pleaded. The forms given by the rule of *Trinity* term 1 *W.* 4., are not prescribed to be invariably followed, but are to be adopted merely with reference to costs. In the present case it is clear that the goods must have been sold and

(a) 14 East, 291.

(b) *Ante*, 84.

shillings weekly and every week from the then  
time, for and towards the keeping, sustentation  
and maintenance of the said bastard child, for and  
so long time as the said bastard child should  
be chargeable to the said parish of *Portsea*: and they  
thereby order, that the said *Mary Ann Charlton*  
also pay, or cause to be paid to the said church-  
warden and overseers of the poor of the said parish of  
*Portsea* for the time being, or to some or one of them,  
the sum of sixpence weekly and every week, so long as  
the said bastard child should be chargeable to the said  
parish of *Portsea*, in case she should not nurse and  
bring up the said child herself.

On the 10th November 1884, *Mary Ann Charlton*  
lawfully married to one *Joseph Toe*, who is still

The said child was, at the date of the warrant  
aforesaid, about the age of three years,  
and has been living with its mother and the said *Joseph*  
since the said marriage.

In obedience to the said order, the plaintiff paid  
and every week the said sum of two shillings,  
until the 1st of January 1885, when he refused, and ceased to make any  
payment in obedience thereto.

The said child was chargeable to the said parish up  
to the time of the said marriage and after the said

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by the said officers from the stock and at the expense of the said parish. The means of livelihood of the said husband and *Mary Ann* were at that time 15 a-week, which he received for labour, his family then being himself, his said wife *Mary Ann*, and one child aged two years (a).

Some weeks after the said plaintiff had discontinued his payments, the said parish officers informed the said defendant, so being such justice, of the above circumstances, whereupon the defendant issued his summons to the plaintiff to appear before him and answer. The said plaintiff appeared thereupon, and showed cause before the said defendant why he should not make any further payments, and refused to make any further payments in obedience to the said order. The defendant considered the cause so shown to be insufficient, and thereupon convicted the plaintiff, and a warrant, dated 3d *September* 1835, committed him to prison, in which he remained for a short time, when he paid what was required and was discharged.

The action is brought in respect of that imprisonment.

No question is raised regarding the said order, any of the proceedings before the said justices, in point of form, or regarding the sufficiency of the plaintiff's notice to the defendant of this action; all were done made according to the several statutes in such cases respectively provided.

The question for the opinion of the court is, whether, under the above-mentioned circumstances, the liability of the plaintiff to make any further payments in obedience to the said order, after the said marriage was suspended or removed by the statute of the 4 &

(a) It was admitted, in the course of the argument, that the defendant at the hearing of the case thought this sum sufficient to maintain the husband's family and the child in question.

judgment shall and may be entered against him *prosequi* immediately after the decision of this otherwise, as the court may think fit. But if it shall be of a contrary opinion, then the de- agrees that judgment shall be entered against confession of 10*l.* damages immediately after ision of this case, or otherwise, as the court may t, and that judgment shall be entered accord-

iger for the plaintiff. By the 57th section of : 5 W. 4. c. 76., the liability of the father is ged, or at least suspended during the marriage. ords of the clause are "that every man who ad after the passing of this act shall marry a having a child or children at the time of such e, whether such child or children be legitimate itimate, shall be liable to maintain such child or as a part of his family, and shall be chargeable relief, or the cost price thereof, granted to or unt of such child or children, until such child dren shall respectively attain the age of six- : until the death of the mother of such child or n; and such child or children shall, for the pur- f this act, be deemed a part of such husband's accordingly." No words can be more general

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tion. It appears from the case that this child was in fact chargeable to the parish of *Portsea*, and that the order was for the father to pay towards its maintenance while it remained so chargeable. If we may speculate on the intention of the legislature, the object of the act was to prevent a man reaping any benefit from marrying a woman with several bastard children, which formerly was a very frequent occurrence. [Lord Abinger C. B. The question is, whether this act is to have a retrospective effect to take away the interest of the husband in the *dowry* of his wife?] But even if the intent of the clause was otherwise, the words employed are clear and unambiguous, and ought to be interpreted according to their ordinary meaning. In *The King v. Barham* (a) Lord Tenterden said, "Our decision may perhaps in this particular case operate to defeat the object of the 59 G. 3., but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature."

*Dampier* for the defendant. The question is, whether the 57th section of the 4 & 5 W. 4. c. 76., which is affirmative only and not negative, shall destroy the effect of the 18 *Eliz.* c. 3. and the 49 G. 3. c. 68., both of which are positive statutes. By section 70 of the 4 & 5 W. 4. c. 76., all securities for indemnifying parishes against children likely to be born bastards, whereof single women might be pregnant at the passing of the act, are declared void; from which it may be inferred that the intention was to keep in force securities as to children born prior to the statute. Though the husband may be liable to maintain the child on

(a) 8 B. & C. 104.

the hands of trustees, to which the former  
to resort for re-payment; *Re v. Nether-*  
*ex v. Inhabitants of Oxfordshire* (b). Here  
may commit both the father and the  
r, in case they refuse to support the child,  
guilty of an offence against the law if they  
ide for its maintenance. But it is submitted  
applies only to children born subsequently  
ng, and, at all events, that it does not ex-  
es in which orders of maintenance have  
n made. [*Parke B.* Under section 72.,  
in sessions would have no power to make  
the putative father where the mother has  
the child is born after the passing of the  
only in case of the inability of the mother  
order can be made. Lord *Abinger C. B.*  
ject does the 57th section refer if it does  
children born before the act?]

in reply. Where two affirmative statutes  
tent, the latter is held to repeal the former;  
e 4 & 5 W. 4. c. 76. is clearly inconsistent  
*Eliz.* and 49 G. 3. It is said that there  
is for the support of the child, and that the  
of the 4 & 5 W. 4. only makes the hus-  
to pay for its maintenance out of the fund

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cumstances can the husband obtain any part of the fund, and no payment by the father would discharge him from the obligation expressly cast upon him by the act. [Lord *Abinger* C. B. Suppose that the husband were to become incapable of maintaining the child, it would then be chargeable to the parish. A liability might, under those circumstances, attach on the father, and therefore it may be that his liability is only suspended while the husband is able to support the child; but it is rather conceived, that during the marriage his liability is altogether suspended. The act says that the child is to be a part of the husband's family, and if he is unable to maintain it, he will become chargeable on account of such child. Before the act there was some doubt whether relief given to a subordinate member of the family was relief to the father. [*Parke* B. If both the father and the father-in-law are to be liable, are they to be jointly liable, or is the father to be primarily liable? Is the husband to receive the fund from the father whether it be sufficient or not, and is he to be liable for the support of the child? There is no provision for the payment of the fund to the father-in-law, it is payable to the parish. I do not see that the child, after the marriage of the mother, is chargeable to the parish at all; for the husband is bound by the act to maintain it. Lord *Abinger* C. B. The moment the woman marries, the parish has nothing to do with the child. Suppose that there were a gift or legacy to the child sufficient for its maintenance, it is a question whether the order would not be at an end. It is the same thing where an act of parliament says that the husband shall support it, for a parliamentary provision is made for the child.]

Lord ABINGER C. B.—I do not know whether it



instances of the present case, he is sufficiently so, it seems to me that we have before us a provision, imposing the obligation upon the father, and removing the chargeability from the mother. I am therefore of opinion that the child being no longer chargeable to the parish, the order is de facto at least suspended. It is clear that orders made under former statutes were only made for the benefit of the parish, and it is better for the parish to insist that the child is no longer chargeable. Then if the child has ceased to be chargeable, an order made on the putative father can no longer be enforced.

**J. B.**—I am of the same opinion. There is no question raised here as to the liability of the magistrate in making an order for the maintenance of the child in case of trespass. The question which the Lords have agreed to submit to our consideration is, whether the father is liable to make any further payment under the order for the maintenance of this child, and it appears to me that he is not. It has been held in *Ex parte* that the husband has sufficient funds to maintain his wife and child, and I agree with the Lord Chief Baron, that the object of the clause in the act is to make a parliamentary provision for the child. It is not necessary in my opinion what would be the consequence in

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liable, it seems to me that both are not liable. There are here express affirmative words, and I should say that their effect is to do away with the liability of the father during the marriage, whether or not the husband is in circumstances which enable him to maintain the child.

BOLLAND B.—I am of the same opinion. The act is clearly intended to make the husband support the children, whether legitimate or illegitimate, of the wife. The liability of the parish can only arise from the inability of the husband, but here it is admitted that he earns sufficient to maintain himself and his family including this child. It is not easy to see how the father can be liable under any circumstances. Suppose the child to be chargeable at the time of the marriage; if the chargeability is to continue, the act would be inoperative. If the mother should die, or the child attain the age of sixteen, the parish may then be called upon to support it, but not before. It appears to me that they come here to continue a charge from which the law has relieved them, and they ask the court to compel the father to do that which by law he is no longer bound to do.

GURNEY B.—I think that the statute has transferred the liability from the father to the husband.

Judgment for the plaintiff.

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BULL *against* TURNER.

*ER* had obtained a rule *nisi* why the sum of 10s., which had been paid into court in this in lieu of bail, should not be taken out by the court in discharge of the debt and costs, the plaintiff obtained judgment and taxed his costs. It appeared that the defendant, on being arrested in September last, applied to a Mrs. *Lake* to become special bail for him, who refused, but paid the above sum into court in lieu of becoming such special bail. On 14th January the defendant rendered himself to

A defendant, on being arrested, applied to a party to become special bail for him, who refused, but paid a sum of money into court in lieu of bail. Held, that the money must be taken to have been paid into court under the 7 & 8 G. 4.

c. 71. s. 2., and that the party so paying it could only have it repaid upon the same terms as the defendant could have done, if he himself had paid it into court; and the court made a rule absolute for paying it over to the plaintiff in discharge of his debt and costs.

the defendant now showed cause. This money was not paid according to the precise terms of the 7 & 8 G. 4. c. 71. s. 2., which seems only to apply to a deposit made by the defendant himself. This is the case of a party, who will not become special bail for the defendant, but is willing to run the risk of the event

of the event. If the defendant had put in special bail, he might have rendered him at any time before he was charged in execution; here he was not so, for he had previously rendered himself to

the court. There is a distinction between the payment of money into court, pursuant to the statute of 7 & 8 G. 4. c. 71. s. 2., and the payment of this sum under the circumstances of the present case. [*Parke B.* could the money be paid into court except under the statute?] Before the act the Court of Common Pleas permitted a defendant to pay in a sum sufficient to cover debt and costs, *Fowell v. Leo* (a). [*Parke B.*

(a) 1 Taunt. 425.

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It was there paid in to abide the event of the cause, and if this was paid in to abide the event, the plaintiff is entitled to it. You say that the money has been deposited subject to all the equities under which the bail, supposing special bail had been put in, might have rendered the defendant.] It amounts to the same thing as special bail. In *Nunn v. Powell* (a) it was decided, that where a third person, instead of the defendant, deposits a sum with the sheriff, under 43 G. 3. c. 46, the court, on the defendant being rendered, will order it to be repaid to the party making such deposit. [*Parke B.* That is where it is deposited in lieu of bail to the sheriff. Here, if you show no specific terms on which the money was paid in, it must be assumed to be paid in under the 7 & 8 G. 4.] The same construction ought to prevail with respect to both statutes; for by both the sum deposited is to be repaid to the defendant in certain events; and neither act alludes to any one but the defendant himself.

PARKE B.—If the money once gets into court in lieu of bail, it must remain there until the action is decided. If the defendant should obtain judgment, it is then to be repaid. It is perfectly clear that the party has paid this sum into court instead of the defendant; and if so she can only have it back upon the same terms as he could have done.

ALDERSON and GURNEY Bs. concurred.

(a) 1 Smith, 13.

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BADDELEY *against* GILMORE.

**R. V. RICHARDS** had obtained a rule *nisi* for the issuing of a commission to examine witnesses at *Sydney* in *New South Wales*. The action was brought by the mate of a vessel against the captain, upon a special contract for wages; the defence pleaded was, that the plaintiff had assaulted the defendant, and had been guilty of mutinous conduct at *Sydney*, which had rendered it necessary for the latter to discharge him. The affidavit on which the rule was granted, alleged that the facts stated in the pleas, or the material part of them, occurred in the presence of the witnesses specified, that they were now settled or resident at *Sydney*, and that their evidence was material and necessary to the defence.

A rule nisi for a commission to examine witnesses, was obtained on an affidavit, which stated that the facts alleged in the pleas took place in the presence of the witnesses, that they resided abroad, and that their evidence was material and necessary.

The affidavit was held sufficient, although it did not say that the evidence was admissible, or swear to merits, or aver that the application was *bonâ fide* and not for delay.

The court, on making the rule absolute for the commission, refused to impose terms on the party by whom it was obtained.

*J. J. Williams* showed cause. This affidavit is objectionable on several grounds. Although it states that the parties are material witnesses, it does not allege that their evidence is admissible. Neither does it swear to merits, or say that the application is *bonâ fide* and not made for delay. In *Lloyd v. Key* (a) there was both an affidavit of merits, and also that the application was *bonâ fide*; yet it was there held, that where a witness resides at a great distance it ought to be clearly made out to the satisfaction of the court, not only that the evidence which the witness is expected to give is material and necessary, but also that it is admissible. [Lord Abinger C. B. How do you suggest that the evidence of the witnesses is not admissible? It is averred that they are material witnesses, and that the

(a) 3 Dowl. P. C. 253.

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transaction stated in the pleas took place in their presence.]

*Richards contrà.* In the case cited, the application was refused because the court thought that it was made for delay. [Lord Abinger C. B. Does your affidavit say any thing as to merits?] It states the pleadings and the facts of the case, that the witnesses will be able to prove the material parts of the pleas, and that the defendant is advised he cannot safely go to trial without their evidence.

LORD ABINGER C. B.—I think the affidavit is sufficient, and that your rule must be absolute.

The other Barons concurred.

*Williams* applied that the amount of the money claimed for wages might be paid into court; stating that it would be two years before the commission would be returned.

*Richards* submitted that the defendant was entitled to the commission as a matter of right, and not of indulgence, and that as the court were of opinion that he had shown himself entitled to the rule, no terms ought to be imposed upon him.

The Court refused to make the order.

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complaint on petition in His Majesty's Court of Bankruptcy in that behalf. That the said fiat being in full force, and the defendant remaining and continuing indebted to the plaintiff and the said other persons, afterwards and before the defendant had been adjudged to be a bankrupt within the true intent and meaning of the said statutes under the said fiat, and before the defendant had obtained any certificate of conformity to the said fiat, to wit, on &c., it was wrongfully, and against the form of the said statutes and laws then in force concerning bankrupts, agreed by and between the plaintiff and the defendant, without the concurrence or consent of the said other creditors of the defendant, that the plaintiff should not further prosecute or put in force, or cause to be prosecuted or put in force the said fiat, and that he should abandon the same and all further prosecution and proceedings under the same; and that in consideration thereof the defendant should accept the said bill of exchange and deliver the same to the plaintiff. That in pursuance of the said agreement, and in performance and fulfilment thereof, the defendant did afterwards, to wit, on &c., accept the said bill of exchange and deliver the same to the plaintiff, and the plaintiff then received the same from the defendant accordingly; and the defendant avers, that the consideration in this plea mentioned and so agreed on as aforesaid, was the consideration for the said acceptance of the said bill by the defendant as aforesaid.

Demurrer, assigning for causes that it does not appear in or by the said plea that the consideration therein mentioned as the consideration for the acceptance of the said bill of exchange, was the only consideration for such acceptance. And also, that it does not appear in or by the said plea but that the defendant received other good and valuable consideration for the

acceptance and payment by him of the said bill of exchange. Joinder in demurrer.

The matter of law intended to be argued for the plaintiff was thus set out in the demurrer book: that the facts stated in the plea do not render the bill of exchange invalid as against the defendant, but, on the contrary, show a full and sufficient legal consideration for the acceptance and payment by the defendant of the said bill of exchange.

The case was argued in the present term by *Erle* in support of the demurrer, and by *Humfrey*, *contra*, in support of the plea, before Lord *Abinger* C. B., *Parke*, *Bolland*, and *Gurney* Bs.

The Court took time to consider, and their judgment was now delivered by

PARKE B. (who, after stating the pleadings, proceeded).—The objections to this plea were, first, that instead of showing a want of consideration for the acceptance of the bill, it disclosed a sufficient consideration: and secondly, that there was no illegality in the contract in pursuance of which it was given.

It is unnecessary to decide whether the plea must be taken to aver that the acceptance was given wholly as a premium or gratuity for abandoning the fiat of bankruptcy; or whether it was given for the debt of 100*l.* and upwards due to the plaintiff, in consideration of his so doing. If the agreement to abandon the fiat, for a special benefit to the plaintiff, was illegal, it avoids the bill of exchange between these parties, whether such agreement was part or the whole of the consideration for giving it.

We are of opinion that the facts stated in this plea sufficiently show the agreement to have been illegal.

The objection was, that the agreement was illegal

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and void only against creditors of the defendant claiming under a commission, not against his creditors generally; and though it was averred that there were unpaid creditors at the time of the agreement, it was not alleged that they had sued out or could sue out another fiat.

We think that this objection is not well founded.

Independently of the provision of the 6 G. 4. c. 1 s. 8., which makes a trader's composition with a petitioning creditor an act of bankruptcy, and renders the creditor liable to refund what he has received, and to forfeit his original debt, such a composition is illegal, on the ground of its being an abuse of a process which a creditor has a right to sue out, not for his own benefit only, but for that of the other creditors also. Upon this principle the case of *Ex parte Thompson* (a) was decided by Lord *Thurlow*; and his lordship ordered a sum of money received by the petitioning creditor to be refunded to the trader, although the commission had been superseded, and no fresh commission had been issued.

This order was, no doubt, made by virtue of the general jurisdiction of the great seal in matters of bankruptcy; but the reason of its exercise in this particular mode was, that the composition itself was illegal and void, by the general policy of the law, against the then creditors of the bankrupt; and no court ought to enforce an executory contract, which is illegal and void at the time it is made against other persons. The cases of *Jackson v. Duchaire* (b), *Cockshott v. Bennett* (c), *Leicester v. Rose* (d), and others, proceed upon this principle. The transactions referred to in the course of the argument as being valid between the

(a) 1 Ves. jun. 157.

(c) 3 T. R. 763.

(b) 3 T. R. 551.

(d) 4 East, 372.

said iron and other metals and metallic substances with water, in the said pits, holes, and works, and kept and continued the said iron and other metals and metallic substances so covered with water in the said pits, &c. for divers long spaces of time then next following, whereby the said water therein became and was mixed and impregnated with iron and other metallic and noxious mineral substances; and afterwards, to wit, on &c., and on divers other days &c., wrongfully and injuriously let off, emptied, and discharged the water so mixed and impregnated with iron and other metallic and noxious mineral substances, as aforesaid, from and out of the said pits &c., unto and into the said stream or watercourse so running and flowing into, through, over, and along the said closes, &c. of the plaintiffs, and from and by which the said pool or pond of water was, and still of right ought to be, fed and supplied as aforesaid, whereby the water of the said stream or watercourse, and of the said pool or pond so situate in and upon one of the said closes &c. of the plaintiffs as aforesaid, and so fed and supplied by and from the said stream or watercourse as aforesaid, became and was impregnated with the said metallic and noxious mineral substances with which the water so let off, emptied, and discharged by the defendants from and out of the said pits, &c. into the said stream or watercourse as aforesaid, was so mixed and impregnated as aforesaid, and the banks and edges of the said part of the said stream or watercourse so running and flowing into, through, over, and along the said closes, &c. of the plaintiffs as aforesaid, and of the said pool or pond of water so situate and being in and upon one of the said closes, &c. of the said plaintiffs, became and were covered, and the bottom and bed of the said pool or pond of water became, and was and still is, choked and filled up with a certain noxious sediment, stratum,

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or deposit arising from the settling of the said metallic and noxious mineral substances with which the said water so let off, emptied, and discharged by the defendants, from the said pits &c. as aforesaid, were so mixed and impregnated as aforesaid, and by reason of the bottom and bed of the said pool or pond of water so being choked and filled up with the said noxious sediment, stratum, and deposit as aforesaid, the water thereof so mixed and impregnated with the said metallic and noxious and mineral substances as aforesaid, overflowed and inundated a great part, to wit, 100 acres of the said closes, &c. of the plaintiffs; by reason of all which said several premises the said closes &c., and the soil thereof, have been and are greatly impoverished and deteriorated, and the reversionary estate and interest of the plaintiffs of and in the same hath been and is, by means of the premises, very much injured, &c. The declaration contained another count, which was substantially the same as the first.

Pleas: first, not guilty. Secondly, that before and at the time of the committing of the grievances, &c. the most noble *Henry William* marquis of *Anglesea* was the occupier of the said lands and premises, in and upon which the said pits, holes, and works were so made and sunk, as in the first count mentioned, and was also the occupier of a certain mine, to wit, a copper mine, on the said lands and premises, and which said mine, for a period exceeding the period of forty years next before the commencement of this suit, and also at the time of the committing of the said grievances, had been and was worked by the occupier thereof for the time being. And the defendants further say, that the said marquis, and all the occupiers for the time being of the said mine, and of the said land and premises wherein the said pits, &c. were so made and sunk as

12th *November* 1779, by a certain *indenture* then made between the said *Rice Thomas* of the one part, and *Edward Hughes* and *Thomas Williams* of the other part, *enfeoffed* the said *Edward Hughes* and *Thomas Williams* of the said closes, pieces or parcels of land, hereditaments and premises, in the first count mentioned, to have and to hold the same, with their appurtenances, unto the said *Edward Hughes* and *Thomas Williams*, their heirs and assigns, as tenants in common and not as joint tenants, from the day and year next before the date of that *indenture*, for and during the term of the natural lives of (the three persons therein mentioned,) and the life of the longest liver of them, at and under a certain yearly rent and services, being so much as were at the time of the said *indenture* of the 21st *July* 1778 reserved and payable for the same; which said rents and services were to continue due and payable during the continuance of the said last-mentioned lease, which said last-mentioned lease was not made *dispunishable* of waste: and the said *Edward Hughes* and *Thomas Williams* did, at the time of making the said *indenture* of lease, duly execute a counterpart thereof, which was had and taken by the said *Rice Thomas* accordingly. By virtue of which *feoffment*, the said *Edward Hughes* and *Thomas Williams*, afterwards, to wit, on the said 12th day of *November* 1779, became and were seised of and in the said premises, by the said last-mentioned *indenture* *enmised* and granted as aforesaid, according to the term and effect of the said *indenture* of *feoffment*: and the plaintiffs further say, that the said term by the said *indenture* of *feoffment* created, was, at the time of the committing of the grievances by the defendants in the first count mentioned, and still is subsisting, he the said (one of the *cestui que vies*,) during all the time aforesaid and still being alive. Verification.

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The plea to the second count, with the rejoinder thereto, were in substance the same as the replication above set forth.

Demurrer to the replications, assigning the following causes. That the said replications respectively state that by indenture of the 21st July 1778, in the said replications respectively mentioned, a power of leasing for lives or years was reserved to the said *Rice Thomas* and all and every other person or persons who should become seised in possession of the freehold of the premises by virtue of the limitations in the said indenture contained: and that, by virtue of the limitations in the said indenture on behalf, and by virtue of the power and authority in the said indenture reserved by the said indenture, the said *Rice Thomas* by indenture enfeoffed *Edward Hughes* and *Thomas Williams*, of the said closes, &c. in the first and second counts of the declaration first mentioned; by the mode of pleading the plaintiffs leave it uncertain whether they intend to rely on the indenture last mentioned as a feoffment, or as an appointment under the power of leasing; and the defendants cannot by their demurrers traverse the effect of the said indenture, by law they are entitled to do: also, that if the plaintiffs intend to rely on the said indenture as an appointment, they ought in their replications to have averred the same according to the legal effect thereof, and to have averred that the said *Rice Thomas* appointed the said closes, &c. to the said *Edward Hughes* and *Thomas Williams*, instead of averring that he enfeoffed the said closes, &c. to the said *Edward Hughes* and *Thomas Williams*: also, that if the plaintiffs intend to rely on the said indenture as a feoffment, they ought to have shown that livery of seisin was made; whereas livery cannot be implied in the word enfeoffment, the same is used in the said replications: also, that no averment is made of the said indenture in the said replications respectively mentioned: also, that

indenture being made by the said *Rice Thomas*, who appears by the said replications to have been a tenant for life only, the continuance of his life ought to have been averred. Joinder in demurrer.

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The points stated for argument on the part of the defendants were, that it is equivocal whether the plaintiffs rely on the indenture in the replications lastly mentioned as an appointment under the power of leasing or as a feoffment, and that the defendants cannot safely rejoin by traversing an appointment, or showing the avoidance of the estate for lives created by the feoffment: that a feoffment cannot be by deed alone, and that, by the form of the allegation, the implication of livery being excluded, profert of the deed ought to have been made: that if the indenture is insisted on as an appointment, it ought to have been pleaded according to its legal effect: that though in the word "enfeoffed" livery is implied, there cannot be such an implication where it is alleged that a person "by indenture enfeoffed," and "that the lessees, by virtue of the indenture of feoffment, became seised," and the lease for lives becoming void on the death of the tenant for life, his life ought to have been averred, and not being so, it does not appear that the action has been brought within three years after the end or determination of the lease (a).

On the part of the plaintiffs, the points stated for argument were, that the pleas were bad.

First, because the case is not within the statute 2 & 3 W. 4. c. 71.

Secondly, because the time is not alleged to have run before the act complained of.

And they submitted that their replication was good.

First, because it is pleaded in the usual form.

(a) This had reference to the eighth section of the 2 & 3 W. 4. c. 71.

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Secondly, because it shows that the feoffment then mentioned was intended as an execution of the power stated.

*Wightman* for the defendants, in support of demurrer. It is objected to these pleas, that they do not state a user for forty years before the time of the acts complained of in the declaration; but it is submitted that such a user is not required by the statute. According to the true construction of the act, the time is to be calculated back from the commencement of the suit; and its intention clearly is, that where parties have chosen to lay by for forty years before bringing their action, they shall be barred. The words of the second section of the 2 & 3 W. 4. c. 71. are "that no claim which may be lawfully made at common law by custom, prescription, or grant, to a way or other easement, or to any watercourse, or for the use of any water to be enjoyed or derived upon, or from any land or water of our said lord the king, &c. when such way or other matter as herein last before mentioned shall have been actually enjoyed by some person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to some period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. And, by the fourth section, it is provided "that e

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of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action* wherein the claim or matter to which such period may relate shall have been or shall be brought in question." The statute presumes that there has been a series of acts which, but for the user of forty years, would have been wrong, and it has fixed a time within which a party must bring his action if he means to complain of the acts done. If it were necessary to aver in a plea a user for forty years before the time when, &c., a plaintiff might give in evidence some act committed many years before, and the defendant would be compelled, in order to support his plea, to prove a user for forty years prior to the committing of such act. [Lord Abinger C. B. Supposing the statute of limitations not to be pleaded, a defendant might be made to prove a user for forty years before the act first complained of, and to extend his proof over a period of nearly eighty years.] The statute says, in effect, that a party must take care not to let forty years elapse before he commences his suit, otherwise all intermediate acts are safe. [Parke B. The argument on the other side is, that the clause must be read as meaning a user of forty years before the injury complained of, on account of the inconsistency that would otherwise arise. Your pleas are within the words of the statute, but it is said that you ought to show a title to do the act at the time it is committed. There is certainly some inconsistency on the face of the pleas, but perhaps it may be got over. You state in effect that you are entitled to do the act because you have enjoyed the right for some years after the injury was committed.] There is no inconsistency if the object of the legislature be that which has been mentioned. The statute says, that a user of twenty years before the bringing of any action shall confer a



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*primâ facie* title, and one of forty years an indefeasible title. But there would be an inconsistency between the words and the spirit of the act, if the construction intended for on the other side were to prevail. There is another mode of looking at the present question. If a party has enjoyed an easement for forty years, it may be taken to be of right, and consequently that he is entitled to commit any of the acts complained of during that period, and the statute may be supposed to say, that if a person has had such an enjoyment for forty years as of right, that then it shall be indefeasible. At least the plaintiffs have pleaded over, and the court cannot give judgment for them unless they are entitled to it upon the whole of the record. [*Parke B.*] I say that the lawfulness of the act complained of depends upon whether the forty years are allowed to elapse, that if they are, they have a relation back so as to justify the act committed, and that if there is an inconsistency in the language of the pleas, it is cured by the plaintiffs having pleaded over.]

With respect to the objection, that the right claimed is not within the second section of the act, it is conceived that the turning of metallic water into a watercourse is an easement; for if not, there can be nothing as an easement. There is no difference between a watercourse for turning a mill and one to carry off metallic water. [*Parke B.* Where you have a watercourse you have a right to have the water carried off whether clean or dirty.] The words of the second section extend to all easements, but the word "easement" is omitted in the eighth section, and there may be a doubt whether the present case is within the latter clause.

Secondly, as to the replications. They are defective, for while they allege a seisin in *Rice Thorpe* and that in 1779 he made a feoffment to cer

persons, they do not show any connection between the plaintiffs and *Rice Thomas*. *Bright v. Walker* (a) will probably be cited on the other side, but it has no analogy to the present case, for there the parties, namely, the bishop and the lessees, were connected. Here it does not appear what has become of the lessees for life and their estate, but only that one of the *cestui que vies* is still living. Even supposing that the lease is continuing, it is not sufficient for the plaintiffs to show an outstanding estate, they must establish that they are entitled to the reversion expectant upon the determination of that estate. There is also an objection to these replications in point of form. It is equivocal whether the plaintiffs mean to treat the deed creating the lease as a feoffment, or as an appointment, pursuant to the power under which *Rice Thomas* had authority to grant leases by indenture. The replications aver that *Rice Thomas*, by virtue of the power, by indenture enfeoffed. If it had been stated that the party "enfeoffed," which is the proper form of pleading a feoffment, then livery of seisin would have been implied, but here no such implication can arise. Also, if this instrument had been pleaded as a feoffment, the defendants would have had no right to profert, *Jefferson v. Morton* (b); but if as a lease granted pursuant to the power, then either profert must have been made, or the defendants might have demurred. But, as the deed is pleaded, the defendants can neither demand profert nor demur, for they do not know in what manner to treat a deed so informally pleaded.

*J. Jervis contrà.* First, this is not a case within the statute. The right set up in these pleas, which are substantially the same, is not a right to a watercourse

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(a) 4 Tyr. R. 502.

(b) 2 Saund. 90, note.

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in the common acceptation of the word. It is a claim to a watercourse or to the use of water to be enjoyed or derived from or over the land of the plaintiffs, within the meaning of the second section of the act. The right alleged is not a watercourse, but a right to let off dirty water. [*Parke B.* It is to let the defendants' dirty water into the watercourse of the plaintiffs.] This is not a case of the use of water derived from the land of another, for the defendants use the water before it comes to the plaintiffs' ground. [*Lord Abinger C. B.* But they go on to justify the flowing of the water over the land of the plaintiffs. They cannot dig pits in their own land without taking the water from the plaintiffs. [*Parke B.* They do not take the water from you, they only use it in their own land. *Lord Abinger C. B.* It is not your water until it reaches your ground.] It is submitted that this is not a watercourse within the second section, neither is it an easement; for the words "to any way or other easement, or to any watercourse, or the use of any water," show that the easement there spoken of is an easement in the nature of a way, for if the term easement had been employed generally, it would not have been necessary to specify watercourses and the use of water immediately after, inasmuch as they would have been comprehended in such general term. With regard to the eighth section, the word *convenient* seems to have crept into it instead of easement, for, with that exception, the expressions used are the same; and it is not to be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses. There is no reason for thinking that the words "other easements" in the second section, mean easements different from those specified in the eighth section.

Secondly, these pleas contain no justification of

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exercised the right for that period, and may recover damages against the other for doing what he had right to do; inasmuch as the interruption not having been submitted to for a year, is no interruption under the fourth section, and the title of the party claiming the watercourse is complete before the commencement of his suit. Again, suppose the case of a user for twenty years, which does not confer an indefeasible title, and then the lands descend to an idiot; after the lapse of other twenty years, the right is perfected, and no remedy for the trespass can be maintained. [*Parke B.* It is the intention of the act that an enjoyment of twenty years shall be of no avail against an idiot or other person labouring under incapacity, but that one of forty years shall confer an absolute title even against parties under disabilities.] By the sixth section, no presumption shall arise upon proof of an enjoyment for less than the periods prescribed in the other clauses of the act; and the second section declares, that the right must be actually enjoyed for forty years; yet here, on the other side, by putting a literal construction on the fourth section, and saying that the title is perfect if forty years have elapsed previous to the commencement of the suit, attempt to raise a presumption upon a user for a shorter period than forty years, for the action must necessarily be brought after the act complained of is committed. These and other inconsistencies would arise upon the different clauses of the statute if the fourth section is to be construed literally, but all difficulties may be avoided by holding that the intention of the latter section is only to prevent a party from founding a claim upon acts done at distant intervals during the prescribed period, and to require that there shall be a continued user, without any cessation of the right alleged, down to the time of action brought.

Thirdly, with regard to the replications, the case of *Bright v. Walker* disposes of the objection that they do not show that the plaintiffs are entitled to the reversion expectant on the determination of the lease for lives. That case established the broad principle, that the words "as of right" in the fifth section, mean as of right against all the world; and though a party may have acquired a right against *A.*, that is not sufficient. [*Parke B.* In *Bright v. Walker*, the court went very much upon the introduction of the words "tenant for life" into the seventh section.] According to that authority, in case there is a life estate existing, any person may take advantage of it, inasmuch as during its continuance the enjoyment of an easement will not affect the fee, and therefore it is immaterial whether the plaintiffs are shown to possess the reversion expectant in the lease for lives or not; for as the reversioner, whoever he may be, is not bound, there has not been that enjoyment as of right against all the world which is required. [*Lord Abinger C. B.* Your difficulty is, that the plaintiffs' reversion may be derived out of the lease for lives. *Parke B.* According to the seventh section, a tenancy for life is included in the period of forty years. The eighth section only takes it out on condition that the reversioner shall bring his action within three years after its determination; a user of twenty years confers a *prima facie* title, which is good unless the reversioner pursues his remedy within the three years. In *Bright v. Walker* the construction was upon the twenty years' period.] It is submitted that it is necessary to aver that the reversion expectant upon the life estate is in the plaintiffs; but if so, that it sufficiently appears on the whole record that such reversion was vested in them, for they are stated in the declaration to be reversioners of some term, and that term is shown by the replications to be the life estate in question.

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Fourthly, with regard to the form of the replications, the cases of *Tomlinson v. Dighton* (a) and *Daniel Upley* (b) establish that a feoffment is a good execution of a power. The replications state that *Rice Thom* executed the power, and show that he must have intended to do so, for otherwise he had no authority to make a lease for a longer term than his own life; and as he affects to grant one for three lives, the law assumes that he meant to exercise his power; *Clew's* case (c), *Scrope's* case (d). It is admitted, that if the instrument is a feoffment, no profert need be made; and if it be a deed operating under the statute of uses, profert is equally unnecessary (e); so that, in either view of the case, a profert is not required. The plaintiffs were obliged to show that the lease was granted by indenture; for that was prescribed by the power, and an indenture is evidence of a feoffment, which, by the statute of frauds 29 Car. 2. c. 3. s. 1., must not be in writing. At all events, if the word "indenture" is wrong, it should have been specially demurred to, as it is only surplusage. Further, "by indenture enfeoffed," is a correct mode of pleading. The exact form here used is to be found in *Coke's Entries* (f), and although profert was there made, that makes no difference, for it was not necessary. Neither is it requisite in these replications to show that the party made an appointment in pursuance of the power. In *Whitlock's* case (g), the plaintiff set forth a power for the lessor to make leases for lives, and stated that he leased in execution of such power.

*Wightman* in reply. First, with respect to the re-

(a) 1 P. Wms. 149; 1 Salk. 239; 2 Sanders on Uses, 84.

(b) Latch. 139; Sir W. Jones, 137. (c) 6 Co. 18, a.

(d) 10 Co. 143, e. (e) 1 Saund. 9 a. note.

(f) 217, b. (g) 8 Co. 69; Co. Entries, 600.

suit that may be brought, and that the claim resisted by some person having the right to do all events, after the lapse of forty years the reversioner can alone maintain an action, and as, in the case, it cannot be assumed that the plaintiffs' reversion after the expiration of the forty years' replications are clearly bad from not showing plaintiffs possess the reversion expectant on them for lives. Thirdly, as to the form of the reply. It does not necessarily appear that the deed executed was of the power. If the word "grant" had been used, it would have been within the term of the power, but the word "enfeoffed" is not. In *Coke's Entries* profit was made, or over was allowed, which is tantamount.

*Cur. adv.*

The judgment of the court was afterwards delivered by

**LORD ABINGER C. B.**—This is an action on behalf of the plaintiffs for an injury alleged to be done to the interest in the plaintiffs' reversion in certain closes of land. The declaration alleges, that the defendants made pits and holes upon a close adjacent to those of the plaintiffs are possessed of the reversion, over the said last-mentioned closes there is a certain course, in which the water has been accustomed to flow for the use of the tenants and occupiers; and that these pits and holes were filled with water im-

with iron and other metallic substances, which rendered the water impure, in which state the defendants caused it to be turned into the watercourse, and to be mixed with and to adulterate the pure water, which would otherwise have flowed over the plaintiffs' land.


To this the defendants plead two pleas, which are substantially the same; viz. that the marquis of Anglesea was the occupier of a copper mine, and of the closes upon which the pits and holes were sunk: and that he, and all the occupiers of that mine, for the space of forty years before the commencement of this suit, have been accustomed, and were and are entitled as of right to sink the pits and holes in their closes, for the purpose of placing therein the water pumped out of the mine, and of precipitating the copper; and had for the same space of time, before the commencement of this suit, been accustomed of right, and without interruption, to cause the water, after it was so used, to flow down the watercourse in the declaration mentioned, over the closes therein mentioned, and in effect to do that of which plaintiffs complain; and then justify the acts done by them as the servants of the marquis of Anglesea, under the right so set up and exercised for above forty years before the commencement of this suit.

The replications set forth, that *Rice Thomas* was seised in his demesne as of fee of the several closes over which the watercourse passes; and that by certain indentures of lease and release therein stated, his interest was conveyed to trustees for the uses therein mentioned, and one of which was to the use of *Rice Thomas* for his life, with a power to *Rice Thomas*, whilst so seised of the freehold for his life, to grant leases upon certain conditions therein named by indenture; that *Rice Thomas*, by virtue of this settlement, did become seised of the freehold for his life; and that whilst he was

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so seised by virtue of the power therein contained did by indenture, duly made between himself of one part, and *Edward Hughes* and *Thomas William* the other part, enfeoffed the said *Hughes* and *Willi* of the said closes, for and during the term of the l of *William Lewis Hughes*, now Lord *Dinorben*, O *Williams* and *John Davis*, and the longest lives them: and the replications conclude by stating Lord *Dinorben*, one of the lives, is still in being.

To these replications there is a demurrer.

The first point to be considered in this case is, whether the pleas were bad in substance. Two object were made to them.

First, that the right claimed of pouring dirty w into the watercourse in the plaintiffs' land, is not wi section 2 of 2 & 3 W. 4. c. 71.

Secondly, that the pleas are bad, because the f years' enjoyment is not stated to have been before act complained of in the declaration, and justified each of the pleas.

Upon the first of these objections the court intim a clear opinion in the course of the argument. thought that the right in question was within section as being a claim to a watercourse over the land another, and we have seen no reason to change t opinion.

The other objection requires more consideration.

It is said for the plaintiffs, that although the ac sect. 4. expressly states that the periods of twenty forty years shall be deemed and taken to be next fore the commencement of some suit wherein the al shall have been brought into question; yet that enactment must be construed to mean, that the peri shall be those next *before the act complained of*, account of the absurdities and inconveniences to w a literal construction of this provision would give ri

One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added, that one action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before any action. Another was, that if the act be so construed, the plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be; for each justifies an act done at a particular time by the defendant as being *then* lawful and *then* done, *because* the defendant actually enjoyed the right of doing the same thing for a period of time *afterwards*; so that it is said, that the character of the act, whether it be wrongful or rightful, cannot be known at the time by the party doing it, but depends upon a subsequent event.

We are of opinion, however, that it is impossible to construe the act of parliament, as intending that the periods of years mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription, before the act passed, were of the same nature, and the validity of right gained by them depended much upon the mode of enjoyment until that action was brought, in which they came in question: and, with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed, that there is something of the same kind of incongruity, but by no means to the same extent, in

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the usual mode of pleading a prescription, which states that some person seised in fee, from time whereof memory of man is not to the contrary, until and at time when, &c., and *from thence* hitherto, hath had enjoyed, and hath been used and accustomed to have and enjoy, and *still* of right ought to have and enjoy particular easement; and then justifies the act done on reason of that enjoyment, which enjoyment is both before and after the time of such act.

It appears to us that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and legalize every act done in the exercise of the right during their continuance; and we think the pleas are good for these reasons, sufficient in point of law.

The next question is, whether the replications are good, and we are clearly of opinion that they are not.

The enjoyment of the right during forty years alleged in the pleas being admitted, the replications, which state only an existing tenancy for life, are no answer for the time of a tenancy for life in a person who might be otherwise capable of resisting the claim, though excluded by section 7. from the computation of the shorter period of twenty years absolutely, is by section 8. excluded from the computation of the larger period of forty years conditionally only; that is, provided the reversioner expectant on the determination of the tenancy for life, shall within three years (that is, probably before the end of three years,) after such determination resist the right; and it does not appear that the plaintiffs are entitled to the reversion expectant on that lease, though it is averred that they have a reversion expectant on the determination of the interest of the tenants in possession. The tenancy for the life of Lord *Dinor*, the *cestui que vie*, is therefore not to be excluded on pleadings from the period of forty years, and the period being complete, the defendants are entitled to

indefeasible right to the easement claimed.

Another objection was urged to the mode of stating the scoffment in the replication, upon which it is not necessary to enter.

We therefore think that the defendants are entitled to judgment, but on account of the difficulty in construing the new act, and the importance of the case, the plaintiffs may amend on payment of costs.

Judgment accordingly.

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### FRANCO *against* NATUSCH.

DEBT on four policies of insurance effected at *Lloyd's*; one a valued policy for 400*l.* on the body of the ship *Activa*; the second on specie, valued at 300*l.*, or as interest might thereafter be declared, and on goods, valued at 1400*l.*, and on board the vessel; and the third on goods, by agreement between assured and assurers, valued at 500*l.*, in continuation of the former policy on goods valued at 1400*l.*; the fourth on goods by agreement, valued at 200*l.*, in continuation of the two last policies. The voyage insured was, lost or not lost, at and from *St. Michael's* to *Santa Cruz de Teneriffe* and *Lanzarote*, both or either, with liberty to take in and discharge goods at *Madeira*, a Portuguese island, and during the time of discharge and loading at those ports, and from thence to *Fayal*

Where, in an action on a policy of insurance, the loss was laid by perils of the seas, and the insurer pleaded unseaworthiness of ship at the commencement of her voyage, *semble* that the ship must be taken *prima facie* to be seaworthy, and that it lay on the insurer to prove the contrary. But where the insured gave evidence of seaworthiness, and that during rough weather on a short voyage a leak was sprung, which increased on the crew so that they finally abandoned the ship, and no contrary evidence was adduced by the defendant, the court refused a new trial, after a verdict for the plaintiff for the value of the goods on board, on the ground that the finding of the jury that she was seaworthy when she sailed, but was abandoned too soon, was equivocal, no objection having been taken at the trial on that ground.

*Semble*, a policy on "goods valued at 1400*l.*" is a valued policy; without stating the particulars of goods valued.

The onus of proving deviation lies on the insurer.

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in the *Azores* (a). The material issues raised on numerous pleas were, first, whether the loss of ship and goods took place by perils of the seas; secondly, whether the ship was, in the language of the plea, “at the time of her setting sail and departing her said voyage, and of the commencement of the risk in that count mentioned, unseaworthy, and improper and insufficiently manned, equipped, apparelled, as provided for the said voyage in the said policy; thirdly, whether the goods were fraudulently overvalued with a view to deceive the underwriters, and whether there was any deviation in the due course of the voyage. At the trial before *Alderson* B., and a special jury, at the *Guildhall* sittings after last term, it appeared that the schooner *Activa*, of 60 tons, sailed from *St. Michael's* on a voyage to *Teneriffe* and *Lanzarote* on 11 September 1834, having on board a quantity of dollars, worth about 300*l.*, and a quantity of *European* manufactured goods, which the supercargo proved he had selected from one *Buxaglo's* stock in his warehouse at *St. Michael's*, and valued at the market price there, amounting to about 2100*l.* *English*. The master of the vessel swore he had commanded her on several previous voyages; that she had been careened before the voyage in question, and appeared to have undergone more extensive repairs within a short period, during which he had been on a voyage elsewhere, and that she appeared seaworthy at the time of sailing. Shortly after she left port on the voyage insured a gale was blowing, she sprung a leak and had five inches water in her hold on the second day; she continued her voyage in rough weather and strained very much till the sixth day, when she arrived

(a) *St. Michael's*, one of the *Azores* or *Western Islands*, and *Madeira*, being Portuguese possessions; *Teneriffe* and *Lanzarote* being two of the *Canary Islands* belonging to *Spain*.

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off *Madeira* and lay becalmed for two days. The gale being renewed, the master did not dare to bear up to windward to *Funchal* in *Madeira*, but proceeded for *Lanzarote*, when on the 22nd she passed *Forte Ventura*, with thirty inches water in the hold. The hands, five in number, being worn out at the pumps and the water gaining on them, the vessel ceased to obey the rudder, became sluggish on the water and ungovernable, and was finally abandoned when about thirty miles from shore, and within sight of land on three sides. The crew got to the *Grand Canary Island* in one of the boats, having saved the log-book and specie. They looked out for the ship from the high grounds, but she was never seen again. The defendant called no witnesses. The learned baron told the jury that the plaintiff was, on that account, entitled to a verdict on the issue of deviation. He stated that the ship would be lost by perils of the seas if in the course of the perils of the voyage she sunk and foundered at sea. He treated the policy as a valued one, and therefore that it was not incumbent on the plaintiff to prove the value; but added, that he had given *prima facie* evidence on that head, whereas the defendant had not proved the goods to have been fraudulently over-valued. As to the evidence of unseaworthiness, he stated that whether the plaintiff was or was not bound to prove it; he had, in fact, given *prima facie* evidence of it, assuming the issue to be on him; and that the undertaking of the insurers to provide against extraordinary risk produced by accident, proceeded on the implied warranty of the insured that the ship was able to undergo common perils. He added, that where at the time a vessel sails she is apparently seaworthy, and there is distinct evidence adduced that she was not so at the time, or adequately accounting for her subsequent loss, then, though a jury might presume her to have been unseaworthy when

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she sailed, that might be a rash conclusion, for greatest experience is foiled in discovering the pre way in which stress of weather operates on a ship her destruction. The jury found that the vessel seaworthy when she sailed, but was abandoned by crew too soon and without sufficient cause. The learned judge said, that was a verdict for the plaintiff; which observation was not objected to, nor was he required ask the jury what the finding meant, or whether the ship was seaworthy, and the verdict passed accordingly 2100*l.*, the full value of the goods but not of the ship. The supercargo, who spoke to the value of the goods was interested in the ship. The verdict did not include the value of the ship.

*Maule* now moved for a new trial. The onus proving the schooner to be seaworthy lay on the assured not on the insurers. This important question raised but not decided in *Brown v. Tayleure* (a). The loss is so little justified by the length of the voyage and the amount of bad weather encountered, that enough of suspicion arises to make it imperative on the assured to prove the schooner to be seaworthy when the voyage commenced. Nor was this a loss by perils of the seas but by improper desertion, if not barratry. It is not every loss by submersion or sinking that is a loss by perils of the seas; *e. g.* *Henderson v. Jansen* (b), where a lighter which was taking in lac-dye alongside a ship was found sunk at the fall of the tide, without any crew on board. The learned judge treated seaworthiness as an implied warranty on the part of the insured, which however, he held was not incumbent on them to prove. Had it been an express warranty it would be a different question precedent to be so treated in pleading. Denial should be pleaded by denying the allegation in

(a) K. B. Mich. 1835.

(b) K. B. Hil. 1834, 15 January.

declaration that the ship was proceeding on her proper voyage, for a return to the prescribed course, after a deviation, would not be the same voyage insured.

[Alderson B. This point was not made at the trial.]

The policy was open, for the subject-matter to be covered by it was not stated, and the goods to which the value was meant to be ascribed were not specified.

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Lord ABINGER C. B.—The point as to seaworthiness was left to the jury by the learned judge in a manner of which the defendant cannot complain, for it was in substance stated to the jury that the plaintiff had made out a *prima facie* case of seaworthiness, supposing that issue to be on him. The judge then said that it was urged that she perished without a sufficient amount of bad weather to account for her loss by perils of the seas, supposing her seaworthy; and added, that if, in the absence of other evidence than that of the weather during the voyage, they chose to conclude she was not so, as it was open to them to do, that then, though that might be an ill-founded conclusion for reasons he suggested, their verdict must be for the defendant. Now the ship had been extensively repaired before the voyage. As to the deviation, *prima facie* evidence was given by the plaintiff of her going on the voyage, but none of deviation was given on the other side. With regard to the point that she was not lost by perils of the seas, had attention been drawn to it at the trial after the jury had found her to have been too soon abandoned by the crew, it is probable they might have found her to be unseaworthy. But as that point was not made at the trial, and as the learned judge said, in the presence of all parties, that the finding was a verdict for the plaintiff, to which the defendant's counsel did not then object, there can be no new trial to raise that question again. The verdict seems in



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corroboration of an opinion entertained by the jury ~~on~~  
the ship's seaworthiness, and not as finding a loss ~~by~~  
perils of the seas.

PARKE B.—It was laid down in the House of Lords in *Parker v. Potts* (a), that it must be taken *prima facie* that a ship is seaworthy at the commencement of the risk; but that if, soon after her sailing, it appears that she is not sound or fit for sea, without adequate cause of stress of weather, &c. to account for it, the rational inference is, that, notwithstanding appearance she was not seaworthy when the voyage commenced. And the prevailing notion has certainly been, that the burthen of proving unseaworthiness lies on the defendant; and I believe I may say it was the intention of those who framed the new general rules of pleading, *Hil. 4 W. 4*, Assumpsit I., that such proof should fall on the party pleading unseaworthiness. But it is not necessary to decide the question on which side the burden of proof ought to be thrown, for it would make no difference in the present case; as the plaintiff did, in fact, give evidence of repairs, thus tending to prove the ship was fit for sea; whereas the defendant gave no evidence to the contrary, and the learned judge did not tell the jury that the defendant was to make out that the vessel was unseaworthy. The finding of the jury as to the conduct of the master and crew was equivocal, but as it was not called in question at the time, it cannot now be disturbed.

ALDERSON B.—It was contended for the defendant, first, that the ship was unseaworthy, but I never told the jury that the defendant was to satisfy them that she was

(a) 3 Dow's R. 23, on appeal from the Court of Session; see the case of the *Midsummer Blossom*, nom. *Watson v. Clark*, 1 Dow's R. 336; and *Foster v. Steele*, C. P., 6 June 1836.

secondly, that the interest in the goods was incor-  
 rectly laid, a point which was doubtful on the evidence :  
 thirdly, that the policies on the goods were open. I  
 thought them valued, but left it to the jury to find the  
 value of the goods proved to be put on board, and  
 they gave a verdict for their full value as claimed by  
 the plaintiff.

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Rule refused.

### QUIN and Wife *against* KING.

DEBT on a bond, bearing date the 14th *August* 1813, and given by the defendant to the female plaintiff before her marriage, in the penalty of 5600*l.*, conditioned for the payment to her by one *Thomas King* of *W.*, with interest, on the 14th *February* then next coming, according to and in performance of the promise mentioned in a conditional surrender, bearing even date therewith, whereby the said *Thomas King* surrendered to her certain copyhold lands for securing the payment of that sum and interest; and also for the observance of the covenants, &c. comprised in the said surrender. The declaration after stating the debt set out the proviso as contained in the surrender. Verdict, non-payment of the 2800*l.* and interest. Plea, *est factum*.

At the trial before *Alderson B.* at the *London* sittings during this term, the bond, the execution of which was admitted under a judge's order, was produced, stamped with a 1*l.* stamp. It was objected on the ground that such bond was not impressed with a stamp denoting that the *ad valorem* duty had been paid, it was not necessary to produce the surrender to show that fact. Where breaches of a bond are assigned under the 8 & 9 *W. 3. c. 11. s. 8.*, the jury assess the damages under a common *venire*; but where the breaches are suggested on the roll, the *venire* must be special.

The plaintiff, on giving notice of his intention to the other side, is entitled to show in the first instance against a rule.

A bond conditioned for the payment, by a third party, of a sum of money and interest, pursuant to a proviso contained in a conditional surrender bearing even date therewith, whereby such third party surrendered to the obligee certain copyhold lands for securing the same sum and interest. Held, first, that the bond was properly stamped with a 1*l.* stamp, under the 48 *G. 3. c. 149*; and, secondly, that

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part of the defendant, first, that as the defendant, ~~was~~  
no party to the conditional surrender, the bond ought ~~not~~  
under the 48 Geo. 3. c. 149. the stamp act in force ~~at~~  
the time it was given, to have had the full *ad valorem* ~~stamp~~  
stamp of 5*l.*; and secondly, that at all events the plaintiff ~~could~~  
could not show that the bond was properly stamped ~~without~~  
without putting in the surrender, as it bore no stamp ~~denoting~~  
denoting that the *ad valorem* duty had been paid. ~~The~~  
The learned judge overruled both objections, but gave ~~the~~  
the defendant leave to move to enter a nonsuit. ~~The~~  
jury having found for the plaintiff, it was discovered,  
when the verdict was about to be entered, that the  
record contained no award of a *venire* to assess the  
damages, but only to try the issue.

*Bayley* now moved for a rule to show cause why a  
nonsuit should not be entered, or why the assessment  
of damages should not be set aside for irregularity.  
First, this bond should have been impressed with an  
*ad valorem* stamp. *Wood v. Norton* (a) bears in prin-  
ciple upon the present case. [*Alderson* B. There the  
mortgage and the bond were not of even date.] The  
provision in the statute exempting all the instru-  
ments but one from the *ad valorem* duty, applies only  
where the deeds are between the same parties  
[*Parke* B. The act does not say so. Is this not  
bond within the clause, "Bond, &c. given as a securit-  
for the payment of any sum of money, or for the  
transfer, &c. which shall be in part secured by a mor-  
gage, or wadset, or other instrument, &c. bearing eve-  
date with such bond; or for the performance of cove-  
nants contained in such mortgage or other instrument;  
or for both of such purposes?" Here it is recited on  
the face of the bond, that there is a mortgage of the  
same date for securing the payment of the money.]

(a) 9 B. & C. 885; 4 M. & R. 673, S. C.

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At any rate the plaintiff ought to have shown that the ~~ad valorem~~ duty was paid, in order to establish that the bond was properly stamped with a 1*l*. stamp. [Parke B. The answer to that objection is, that the statute does not require that to be done as a condition precedent. The clause does not go on to say that the mortgage must be stamped, otherwise it might be necessary to show that it was so. Here every condition appears to have been complied with which the act imposes.] Secondly, the duty of the jury was at an end when they found the issue in favour of the plaintiff, for they had no power to assess the damages, the award of *venire* being only *ad triandum*. A rule being granted on the latter ground,

*Addison* applied to show cause in the first instance.

*Bayley* objected.

PARKE B.—If you gave notice to the other side that you meant to show cause in the first instance, you may do so.

*Addison* against the rule. The breach assigned in the declaration being the non-payment of the money, the trying of the issue of necessity involves an assessment of the damages. In all questions of damages they may be assessed on trying the issue, unless in those cases where the 8 & 9 W. 3. c. 11. s. 8., makes it necessary to have a special award of *venire* for the purpose. Here the breach assigned is admitted by the plea, and the amount of the damages is mere matter of arithmetical calculation. It may, therefore, be doubted whether any assessment of damages is necessary, but if it was, they have been properly assessed. The authority of the jury is derived from the statute,

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and is not given by the *venire*, for the act says the jury are to assess the damages, and in order to enable them to do so, it is not requisite to have words specially introduced into the *venire*. But it is questionable whether a bond of this kind is within the statute when the plaintiffs merely go for money secured by the bond, for then it does not differ from the case of a common money bond for the payment of principal and interest on a given day. In *Murray v. Lord Stair* (a) a *probit* bond was held not to be within the statute, for there, as here, the amount to be recovered was mere matter of computation. [Parke B. This bond is within the statute, for it is not only for the payment of the money but for the performance of the covenants contained in the surrender.] No breach is assigned upon the covenants. [Parke B. You cannot confine the bond to the payment of the money. You are entitled to have the judgment upon it to stand as a security for the performance of the covenants. The only question is, whether the statute, by implication, gives the jury who try the issue power to assess the damages. In the first clause it does, but not in the second, and I rather think that *non est factum* has been held to fall within the latter, *Ethersey v. Jackson* (b).] In that case there was no breach assigned in the declaration. At all events the court will amend the record, which they may do at any time; for the mistake is in the nature of a misprision, having been committed by their own officer. [Alderson B. Here you want to make an amendment in order to give the jury authority to find their verdict, after they have, in fact, found their verdict, but before it is formally entered.]

(a) 2 B. &amp; C. 82; 3 D. &amp; R. 278.

(b) 8 T. R. 255; see 1 Saund. 58; 2 Saund. 187 b note.

*Bayley* in reply. The breach admitted does not entitle the plaintiffs to an assessment of damages, for the defendant only admits that he did not pay the money at the appointed time. To render an assessment of damages unnecessary the breach should have shown how much is due for principal and interest. But there is a dispute as to the amount of interest, and the parties ought to go before a jury to decide that point. [*Parke* B. The question is, whether this case falls within the first branch, or within the equity of the second branch of the section. The first branch appears to apply to issues joined between parties, where the *venire* would go in the common form, and the jury would have power incidentally to assess the damages. The point is, whether the breach being assigned in the declaration brings the case within that clause, for I think it does not fall within the second, as the breach does not assume the shape of a suggestion. At the first glance the former clause seems only applicable where the breach is assigned in the replication, and here the only issue which the jury have to try is, whether the bond was properly executed. *Alderson* B. There is no issue upon the breach.]

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*Cur. adv. vult.*

A few days afterwards the judgment was delivered by

**PARKE B.**—This was an action upon a bond within the 8 & 9 W. 3. c. 11. s. 8., to which *non est factum* was pleaded. The objection was, that the plaintiff could not recover damages without the award of a special *venire*, and the court took time to consider the case and to look for authorities. The statute provides

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“that in all actions which, from and at  
commenced, &c. upon any bond or  
penal sum for non-performance of a  
agreements in any indenture, deed, or w  
the plaintiff or plaintiffs may assign a  
as he or they shall think fit, *and the j*  
*such action or actions* shall and may  
such damages and costs of suit as have  
usually done in such cases, but also  
of the said breaches so to be assigned  
upon the trial of the issues shall pro  
broken, and that the like judgment sh  
such verdict as heretofore hath been  
such like actions; and if judgment sh  
the plaintiff on a demurrer only, con  
*dict*, the plaintiff upon the roll may  
breaches of the covenants and agree  
think fit, upon which shall issue a wi  
that county, &c., to summon a jury,  
the truth of every one of those bre  
the damages that the plaintiff sh  
thereby.” Two classes of cases :  
plated by the act, one in which t  
signed in the declaration or in the  
other in which they may be st  
Where they are *assigned*, the jury  
the damages without the awar  
but if they are *suggested*, then  
jury to make an assessment  
must be special. This was t  
the court had arrived, from t  
independently of any authori  
*kings v. Hawkshaw* (a) which  
plaintiffs’ counsel, is in point

(a) 2 Stark

ose before Lord *Tenterden*, who said that he recollected a case on the Western circuit, where the same objection was made, and that he thought this form of the record was correct. There is therefore no doubt but upon that authority this rule ought to be refused.

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Rule refused.

**BURLEY against STEPHENS and Wife.**

**THIS** cause, and another action between the same parties, had been referred to arbitration at the spring assizes for *Gloucestershire*, under an order of *nisi prius*, by which a verdict was taken for the plaintiff subject to the award of an arbitrator, who was to make his award on or before the fourth day of the ensuing *Easter* term, but with power for him to enlarge the time. Several meetings took place under the reference, which were attended by both parties, and at the last, which was held two days before the original time fixed for making the award had expired, the arbitrator appointed another meeting for the 29th of the following, to which neither party objected. The arbitrator having neglected to enlarge the time, an application was made to *Parke B.* at chambers, and afterwards to the court in *Trinity* term, for a rule to show cause why the time for making the award should not be enlarged, under the 3 & 4 *Will. 4. c. 42. s. 1.* but both that learned judge and the court thought that they had no power given them by that clause to

An arbitrator appointed under an order of *nisi prius*, had power to enlarge the time for making his award, but no special mode of making such enlargement was pointed out. Two days before the time expired, he appointed another meeting on a subsequent day, in the presence of both parties, to which neither side objected. Held, that this amounted to a due enlargement of the time.

Where a nominal verdict is taken

subject to a reference, in which the verdict is ultimately to depend upon the award, the court cannot make use of such nominal verdict against the opposite party, by giving judgment to be entered upon it.



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grant the rule (a). Mr. Baron *Parke* having suggested that the arbitrator might act upon the partial agreement of the parties to extend the time, he accordingly held a meeting on the appointed day, namely, the 29th of *June*, which the defendants did not attend, and on the same day made his award in favour of the plaintiff.

*Martin* on the part of the defendants, obtained a rule *nisi* in *Michaelmas* term last to set aside the award, upon the ground that there had been no due enlargement of the time; against which, *W. J. Alexander* showed cause in the present term. The court at first discharged the rule, but on its being intimated that the plaintiff had signed judgment upon the verdict taken for him under the order of *nisi prius*, and was about to tax his costs, the court said that could not be allowed, and directed all proceedings on the *postea* to be stayed until further orders. Afterwards, in the course of the same day, the consideration of the case was resumed.

PARKE B.—I thought that it had been perfectly settled that the court has no power to make use of a nominal verdict, taken subject to a reference, against the opposite party, where the verdict is ultimately to depend upon the award. The cases in which plaintiffs have been allowed to enter up judgment on the nominal verdict, are where such verdict is taken to secure the damages, the amount of which is the only question referred, as in *Woolley v. Kelly* (b), and *Taylor v. Gregory* (c). Here the actual cause of action was to be decided by the arbitrator, and another action between the parties was included in the reference.

With regard to the chief question in the present

(a) See 4 Dowl. 255. (b) 1 B. & C. 68. (c) 2 B. & Ad. 774.

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case, whether the time for making the award was duly enlarged; an application was made to me; and afterwards to the court, to enlarge the time under the 3 & 4 Will. 4. c. 42. s. 39. If the application had been after the point was discussed, as in *Potter v. Newman* (a), I should have granted the rule. I certainly was under the impression, from not having read the clause with attention, that the court had power to enlarge the time only where there had been a revocation of the arbitrator's authority; but I have now satisfied my mind, that the court possesses the power in all cases. With respect to whether what the arbitrator has done here, was in compliance with the order of *nisi prius*, or, in other words, whether the time for making his award was duly enlarged, we will take time to consider the question.

ALDERSON B.—In *Potter v. Newman*, all the court were at first inclined to think that they had power to enlarge the time only where the arbitrator's authority had been revoked, but they were much struck with the argument then advanced, to show that the power is general, and I am now of that opinion.

*Cur. adv. vult.*

PARKE B. on a subsequent day delivered the judgment of the court.—In this case a clause was introduced into the order of *nisi prius* for referring the cause, that the arbitrator should be at liberty to enlarge the time for making his award; but no special mode of enlargement was pointed out, either by indorsement or otherwise. Several meetings were held before the expiration of the time originally fixed for making the

(a) *Ante*, 29.

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award, at the last of which the arbitrator appointed another meeting for the 29th of *June*, to which neither party objected, and on that day made his award. When the case was first argued, some doubt was entertained by the court, whether, under the circumstances, there had been a proper enlargement of time for making the award or not, but we thought that all events there was ground for presuming a parol submission between the parties. We however discharged the rule, considering that the question was too doubtful for us to interfere on behalf of either party, and that if applied to we should probably refuse to enforce the award by attachment, but leave the plaintiff to bring an action upon it, when the question whether it was made in due time might be raised before a jury. It was afterwards suggested, that the plaintiff had signed judgment upon the nominal verdict taken under the order of reference, and proceeding to tax his costs and to issue execution; that it became necessary for the court to decide upon that point, which we took time to consider, and to search the authorities. On referring to the books, we can find no decision upon the mode in which an enlargement of the time for making an award is to take place, when the parties to the submission have not pointed out the manner in which such enlargement is to be made. The question is therefore open to us to say whether upon the facts of the case, the time was duly enlarged, and we are of opinion that it was, inasmuch as the arbitrator appointed another meeting for the 29th of *June*, in the presence of the agents of both parties, which neither side objected: it follows, that as the arbitrator attended on that day and made his award, such award was made in due time; and consequently this rule must be discharged.

Rule discharged accordingly, but without costs.

1836.

WAINWRIGHT, Executor of ABERCROMBY deceased,  
against BLAND and Others.

**A**SSUMPSIT against the defendants, who were three of the directors of the *Imperial Life Insurance Company*, on a policy of insurance dated the 22nd October 1830, insuring the life of the deceased, Miss Helen Abercromby, for the period of two years. The declaration alleged, that Miss Abercromby died on the 21st December 1830, having made her will on the 13th of that month, whereof she appointed the plaintiff sole executor. Plea, the general issue.

At the trial before Lord Abinger C. B. at the Westminster sittings after last Michaelmas term (a), it appeared, that on the first attendance of the deceased at the office of the company, she was accompanied by the wife of the plaintiff, who was her half sister, and then represented that the object of the insurance was to secure a sum of money to the latter, which she should be enabled to do, provided she survived the period of two years—that on being questioned by the actuary, whether she had effected any other insurances upon her life, she replied, that her wish was to insure 5000*l.*, and that as the *Imperial Life Insurance Company* would only take 3000*l.*, she should propose to insure 2000*l.* with some other office,—that when she attended at the office on the day the policy was completed, she was told by the actuary, that the directors were displeased at the answer she had given to his question on the former occasion, they having ascertained that

A party, on insuring her life, made false representations as to her object in effecting the insurance, and also as to her having obtained similar insurances from other offices, both of which facts were found by the jury at the trial to be material to be known by the insurance company. Held, that the policy was thereby avoided, although such false representations were in answer to parol inquiries not comprised in the list of printed questions required by the regulations of the office to be asked of the assured; and although the policy, as framed, was only to be void on false answers being

(a) This was the second time the cause had been tried, see ante, p. 37.

Quere, whether a party may insure his own life for the benefit of another, who provides the money to pay the premiums.

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she had insured 5000*l.* with another office, and had made a proposition to a third; to which she replied that she knew little about the matter herself, as she did as her friends directed. It was shown that she had previous to obtaining the policy in question, effected insurances with various other offices to the amount 11,000*l.* The death of Miss *Abercromby* took place rather suddenly on the 21st *December* following, she having by a will, bearing date on the 13th, and in which the plaintiff was the sole executor, bequeathed the benefit of her policies to her sister Mrs. *Wainwright*. A witness proved, that the plaintiff, shortly after Miss *Abercromby*'s decease, showed him two wills, stating that they were made in order that if one failed the other might do for him. It appeared also that the plaintiff, on taking out probate, swore the personal estate under 100*l.*, and that Miss *Abercromby* had been in indigent circumstances, and without the means of paying the premiums upon the policy, which were in fact paid by the plaintiff. The printed list of questions which the assured, by the rules of the *Imperial Office* was required to answer, contained no question as to the object of the party in making the insurance, or as to any insurances effected with other offices. The lord chief baron, in summing up, took the opinion of the jury upon the following points: first, whether Miss *Abercromby* effected the policy with the *Imperial Office* for her own benefit, or as the agent of the plaintiff; secondly, whether the representations respecting her having insured her life in other offices were false, and were material to be known by the assurers; and thirdly, whether she misrepresented the object for which she sought to insure her life for two years, and whether such object was material to be ascertained by the defendants. The jury found, that she effected the insurance as the agent of the plaintiff, and that her representations both as to having

ured in other offices and as to her object in insuring were false, and were made on material points, whereupon a verdict was entered for the defendants.

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*Erle* now moved for a new trial, and contended, that the intention, or even the conspiracy of third parties, was not admissible in evidence in the present case. Admitting that the fact was established at the trial, that the effecting of the policy was a scheme on the part of the plaintiff, yet as the defendants made their contract with another party, they cannot set that up as a defence. Also the contract was one from which no benefit could arise until Miss *Abercromby's* death; and therefore, whether she effected the policy for her own benefit, or for the benefit of *Wainwright*, was not the question which ought to have been submitted to the jury. Moreover, it appeared that she was to pay the premiums. [*Parke B.* But the plaintiff was to furnish her with the money. *Lord Abinger C. B.* The jury have found that she made the insurance as the agent of *Wainwright*.] Where the deceased, by her representative, claims the amount of the policy, it is not competent for the defendants to set up an intention that a third party was to have the benefit of such policy. [*Lord Abinger C. B.* If the facts are as the jury have found them, it is a clear evasion of the statute of the 14 *Geo. 3. c. 48.* *Parke B.* Your argument is, that any person may insure his own life and give the benefit to another, from whomsoever the funds may come.] The act was never meant to apply to the case of an individual who insures his own life, and at all events it is sufficient to satisfy the statute, if the party has the legal interest in the policy. With respect to the questions which were asked of the deceased, it appeared that it was not the practice of the office to make the inquiries where they knew the parties or any of the referees, which was the

1836.

VERNON *against* TURLEY.

THE defendant was arrested on the 24th September, and gave a bail-bond to the sheriff. On the 29th Richard Turley, a brother of the defendant, went to the plaintiff and made proposals for settling the action, when the plaintiff signed the following document.

“ September 29th, 1835.

“ Memorandum.—I do hereby agree to cause both actions to be ceased that are commenced against *James Caddick* and *James Turley*, and to destroy a bill accepted by *Isaac Caddick* and drawn by me, amount 260*l.*, April 10th, four months, upon *James Turley* entering into an agreement to pay me the balance of my account, (as shall be agreed upon between the parties,) part in iron in one month's time, and the remainder in an acceptance at two months from the date hereof; if he *James Turley* does or should not fulfil his agreement, the present action against him may be proceeded with. The bill of 260*l.*, drawn 10th April 1835 at four months, I received from *James Turley*.

“ *T. W. Vernon.*”

A defendant was arrested on the 24th September, and gave a bail-bond to the sheriff. On the 29th the plaintiff signed a memorandum, whereby he agreed to cause the action to be ceased, upon the defendant entering into an agreement to pay him the balance of his account, part in iron, and part in a bill of exchange; but if the defendant did not fulfil his agreement, the plaintiff might proceed. The defendant did not fulfil his agreement, and on the 8th October the plaintiff

The plaintiff in his affidavit swore, that at the time when the above memorandum was signed, the said gave him notice that he should go forward with the action. On the 20th the defendant delivered to the plaintiff two bills of exchange, one of them drawn by the brother of the defendant and accepted by the latter, and by the brother indorsed to the plaintiff. On the 11th November the plaintiff took an assignment of the bail-bond, and on the 14th commenced an action upon it against the defendant and the two bail, and on the 16th the bail were served with the writ of summons. On the 18th the plaintiff declared *de bene esse* in the original action, and on the 24th declared against one of the bail alone in the action on the bail-bond: Held, first, that the agreement was conditional, and as the defendant did not fulfil it on his part, the plaintiff was not bound by it; secondly, that the taking of the bills was not evidence of a new agreement so as to give time to the defendant:—and the court discharged a rule which had been obtained on behalf of the bail to set aside the bail-bond, on the ground that time had been given to their principal.

A plaintiff may declare *de bene esse* in the original action, after he has brought an action against the bail upon the bail-bond.

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*Richard Turley* promised that the defendant should wait upon him the next day to enter into such agreement, but the defendant never came, and that he made several unsuccessful applications to the defendant for the iron, as mentioned in the said proposal. On the 8th *October* plaintiff wrote the following letter to the defendant and *Isaac Caddick*.

" Gentlemen,

" *Moorcroft, October 8th, 1835.*

" In consequence of the non-performance of appointments made by *Richard Turley* on your behalf to arrange the account between us, I consider myself at liberty and disengaged from the agreement made the 29th *September* 1835, and unless satisfactory arrangements are made this day for the payment of the money, I shall proceed immediately with both actions.

" Yours, &c.,

" T. W. VERNON

" To Messrs. *James Turley* and *Isaac Caddick*."

It appeared from the defendant's affidavit, that on the 20th *October* he delivered to the plaintiff two bills of exchange, one for 115*l.*, being the defendant's own bill, and the other for 100*l.*, drawn by *Richard Turley* upon and accepted by the defendant, and by *Richard Turley* indorsed to the plaintiff. On the 11th *November* the plaintiff took an assignment of the bail-bond, and on the 14th commenced an action against the defendant and his bail, and on the 16th *Whitehouse* and *Hodgins*, the bail, were served with the writ of summons. On the 18th the plaintiff declared *de bene esse* against the defendant in the above action, and on the 24th declared against *Hodgins* alone in the action upon the bail-bond. On the 2d *December* *Hodgins* obtained a week's time to plead, and on the 9th pleaded a plea, to which the plaintiff, on the 23d, demurred. On the 1st *January* he obtained, under a judge's order, a week's time to join in demurrer, which



period was extended, under another order, until the 12th (a). On that day *Archbold*, on behalf of the bail, obtained a rule nisi for setting aside the bail-bond and all proceedings thereon, on the ground that time had been given to *James Turley*, the principal.

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*Erle* (*Whitmore* with him) now showed cause. The memorandum signed by the plaintiff was only a conditional agreement, and does not fall within the principle of the case where a cognovit has been taken to pay the debt by instalments. It is also a material fact that the agreement was made with the brother and not with the defendant, who was to call the next day to enter into it, but never came. The arrangement therefore was at an end, and there never was any binding obligation on the plaintiff not to proceed with the action. It has been held, that a mere honorary obligation on the part of a plaintiff not to press a defendant for the debt and costs, is not such an indulgence as will release his bail, *Ladbroke v. Hemett* (b); but here the plaintiff never entered into even an honorary engagement not to go forward with his suit, and he gave the defendant a written notice that he should proceed. It is true that two bills of exchange were handed over to him, but they turned out to be of no value. At all events this application should have been made in *Michaelmas* term, for where bail apply to set aside the proceedings upon the bail-bond for irregularity, they should come in a reasonable time. [*Parke B.* When do you show that the bail had notice of the agreement?] It appears from the affidavits on the other side that they knew of it on the 2d *October*.

*Archbold* contra. If a plaintiff wishes to declare *de*

(a) See post, p. 427.

(b) 1 Dowl. P. C. 488.

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*bene esse* in the original action, he must do so before he takes proceedings against the bail, otherwise it is a waiver of such proceedings. Here the plaintiff did not declare until several days after issuing the writ of summons upon the bail-bond, which was thereby waived. [Parke B. What authority have you for that? By the practice of the courts a plaintiff cannot proceed in the original cause after he has commenced an action against the bail.

Whitmore mentioned *Collet v. Bland* (a), as showing the contrary.

[Parke B. The plaintiff declares *de bene esse* in the original action, in order that he may contend that he has lost a trial when an application is made to set aside the proceedings against the bail, and so have the bail-bond to stand as a security. It is not necessarily inconsistent,—it is only a conditional proceeding. Lord Abinger C. B. I do not see that it is inconsistent. Does the court hold, that, after declaring *de bene esse*, a plaintiff can proceed against the bail? [Parke B. If a plaintiff were to declare in chief it would be a waiver, but not if he only declares *de bene esse*.] By the rule of court, he could not declare in chief until after special bail is put in. It has always been understood, that after commencing an action upon the bail-bond, a plaintiff cannot proceed in the original suit without waiving the proceedings against the bail.

But the principal point in this case is, that the plaintiff has given time to the defendant without the consent of the bail. It has been said on the other side, that the agreement was not with the defendant but with his brother; on its face however it appears to have been

(a) 4 Taunt. 715.

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made with the former. [Lord Abinger C. B. There is enough stated in the agreement to show that it was executory, for the defendant was to enter into an agreement on his part, which he never did.] The defendant swears, that one of the principal objects in entering into the arrangement, was to relieve the bail to the sheriff from their liability. The agreement was acted upon, for in pursuance of it the plaintiff received two bills of exchange from the defendant, on one of which he got the additional security of the brother; and after taking that bill, he could not proceed against the defendant in the original action. The plaintiff does not swear that the bills have ever been returned. Assuming the fact to be that they proved of no value, yet that makes no difference; for in *Willison v. Whitster* (a), where that circumstance occurred, the bail were held to be discharged. [Parke B. That was a simple agreement to give bills for the amount of the debt and costs; here the bills were given in part-performance of an entire agreement, the rest of which has not been fulfilled; and, even supposing that you could imply from what passed that the parties had abandoned the original agreement, and the plaintiff agreed to take the bills alone, you should have applied to the court in *Michaelmas* term.] The receiving of the bills amounts to an agreement to abandon the proceedings against the bail until they became due. In *Hannington v. Bears* (b), this court held that bail are discharged by time being given to the principal without their consent, although they may not have been damnified.

Lord ABINGER C. B.—There is no occasion to cite cases to show that if time be given to the principal the bail will be discharged. The question in the present

(a) 7 Taunt. 54.

(b) 4 Dowl. P. C. 256.

plaintiff meant to proceed with the action. The question is, whether taking the bills of exchange was a new agreement, and gave time to the defendant. Even if that were so, the bail should have appeared at the court in *Michaelmas* term; but I do not think the taking of those bills is evidence of a new agreement. For when the plaintiff accepted them, he in his own ability expected that the defendant would perform the remainder of the agreement. This rule must be discharged.

PARKER B.—I am clearly of opinion that it has been made out that the bills were delivered under a new agreement, so as to suspend the proceedings until the time upon them should have run; for they were received in the belief that the defendant would comply with the rest of the agreement. Even if that had been the case, I am of opinion that the bail should have come to the court in *Michaelmas* term.

BOLLAND and GURNEY Bb. concurred.

Rule discharged, with

1836.

**Assignee of the Sheriff of STAFFORDSHIRE,  
against HODGINS.**

Declaration in this case was filed on the 24th November, and on the 2d December the defendant week's time to plead upon the usual terms. The defendant pleaded a plea, to which the plaintiff demurred. On the 1st January the defendant obtained a week's time to join in demurrer, and on the 8th he took out a summons for a rule, in order to allow him an opportunity of applying to the court, which was granted. The rule nisi was given until the 12th, being the last day of the present term, to deliver the joinder in demurrer. On that day the defendant obtained a rule nisi to set aside the bail-bond given in the case, and a stay of proceedings in the meantime; which, after having been enlarged, cause was shown on the 26th, when the rule was discharged with costs. In the course of the same day the plaintiff signed judgment for want of a joinder in demurrer. At seven o'clock in the evening, and after the rule had been so signed, a joinder in demurrer was delivered.

The defendant now moved for a rule to show cause why judgment so signed, and all subsequent proceedings should not be set aside with costs for irregularity, and that such judgment had been signed too late.

(d) See *ante*, p. 421.

On the 23d December the plaintiff demurred to the plea pleaded by the defendant, who, on the 1st January, obtained a week's time to join in demurrer, which was afterwards extended until the 12th under a judge's order. On that day the defendant obtained a rule nisi to set aside the bail-bond with a stay of proceedings in the meantime, against which cause was shown on the 26th, when the rule was discharged with costs. In the course of that day the plaintiff signed judgment for want of a joinder in demurrer. About seven o'clock in the evening, and after such judgment had been signed, a joinder in demurrer was delivered: Held, that the judgment was irregular, and the court set it aside as irregular, but on the terms that the plaintiff should join in demurrer *instantly*, *viz.* before eight o'clock in the evening. The court will abide by the rule, that demurrer books must be delivered four days before the trial.

On the 23d December the plaintiff demurred to the plea pleaded by the defendant, who, on the 1st January, obtained a week's time to join in demurrer, which was afterwards extended until the 12th under a judge's order. On that day the defendant obtained a rule nisi to set aside the bail-bond with a stay of proceedings in the meantime, against which cause was shown on the 26th, when the rule was discharged with costs. In the course of that day the plaintiff signed judgment for want of a joinder in demurrer.

About seven o'clock in the evening, and after such

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soon. When the defendant, on the 12th *January*, obtained the rule nisi for setting aside the bail-bond, had the whole of that day to join in demurrer, and therefore, when the rule was discharged on the 21st, he had the whole of the latter day in which to do such joinder in demurrer; for according to the practice of all the courts, when a motion is granted with stay of proceedings, the party has the same time to plead after such motion is disposed of as he had before, or, at all events, he has a reasonable time allowed him for that purpose. The practice of the court of King's Bench upon this point has varied, but it is now settled. In *Swayne v. Crammond* (a) the court held, that where a rule is granted with a stay of proceedings in the meantime, that the proceedings are staid for all purposes until the rule is discharged. But in *St. Hanlaire v. Byam* (b), *Bayley J.* took a distinction between the adverse proceedings of the plaintiff and those of the defendant for his own security and said, "that the defendant, whose rule nisi was discharged with costs, ought not to be, with respect to time, in a better condition by reason of his own rule improperly obtained." In that case, however, *Swayne v. Crammond* was not brought before the court, and great inconveniences were found to result from the rule there laid down. The point arose again in *Hugh v. Walden* (c), which was a case very similar to the present. *Abbott C. J.*, in giving judgment, said "When a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled (as contended for) to the same time for the purpose of taking the next step, as he had when he obtained the rule. If we think that a defendant in such a case should have a reasonable time allowed him for the purpose of tak-

(a) 4 T. R. 176. (b) 4 B. & C. 970. (c) 5 B. & C. 770,

ext proceeding; and we think that the whole of lay on which the rule is disposed of is such a reasonable time." Here, whether the practice established at case, or that laid down in *Swayne v. Crammond*, adopted, this defendant had the whole of the 26th day to deliver his joinder in demurrer, and consequently the judgment was prematurely signed.

*de contrà* showed cause in the first instance. If it turns out that the application to the court is denied, the defendant ought not to be allowed to advantage of his own wrong, particularly where the step to be taken is his act and not that of the plaintiff. In *St. Hanlaire v. Byam*, it was observed by *Jay J.*, that "in many instances the payment of costs of the rule may not be a sufficient compensation to the plaintiff for the loss of the time." Secondly, it is sworn in the affidavit made on the part of the plaintiff, that the defendant's attorney, when he asked for further time to join in demurrer, allowed the plea was bad, and stated that the facts therein alleged were only ground for an application to the court. Consequently the court has in effect given judgment upon the plea. [*Parke B.* You must discontinue of the plea upon demurrer.] At any rate the court will not set aside the judgment without imposing costs, and will not visit the plaintiff with costs.

*Mr. Bold* replied.

*JUR B.*—The case of *St. Hanlaire v. Byam* seems consistent with principle, but we must be bound by the last decision of the court of King's Bench. The rule must therefore be absolute, but without costs, the point was doubtful.

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May 1831, between *Robert Plummer Weddall* of *Goole*, in the county of *York*, gentleman, of the first part; *Thomas Hawksley Capes* of *Redness*, in the said county, gentleman, of the second part; and *William Weddall* of the same place, gentleman, of the third part. It is agreed between the said *R. P. Weddall* and *T. H. Capes*, that they will forthwith proceed to sell by auction, in lots, the whole of the estates in *Redness*, *Whitgift*, and *Swinefleet*, to which they are now entitled as tenants in common, provided their price can be obtained; and that in default of making sale of the whole, that the said estate, or such part as shall not be sold, shall, after the first day of *August*, and before the first day of *September* next, be divided by *Mr. William Thornton*, of *Redness* aforesaid, into two equal lots, according to the best of his judgment, as to value and convenience: and that the said *R. P. Weddall*, if he think fit, shall have the choice of such two lots upon giving 100*l.* to the said *T. H. Capes*; but if he shall not accept such election, then that he and the said *T. H. Capes* shall draw lots as to the choice: and that each party shall convey to the other accordingly, free from incumbrances by him committed. It is further agreed, that upon such sale and partition the sum of 100*l.* shall be paid by the said *T. H. Capes* to the said *William Weddall*, the principal tenant of the said estate, as a remuneration for his losses, upon his giving up possession of his farm next *Michaelmas*, in addition to what he may be entitled to as off-going tenant, according to the terms of agreement for his farm: and the said *William Weddall* agrees to give up possession of his said farm on *Michaelmas-day* accordingly, which day is understood to be the 11th day of *October* next, reserving to himself the same rights as to his following crop as if this agreement had not been made; but as the said *T. H. Capes* does not now know whether the

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said *William Weddall* be entitled to a following this agreement is not intended to give him that right less he be so entitled, the said *William Weddall* his rent up to *Michaelmas* as heretofore. Witness hands of the parties, the day and year first written.

*Robert P. Weddall*

*Thomas H. Cape*

“ Witness *G. H. Capes*.


*William Weddall*

“ The said *W. Weddall* is to be allowed to keep possession of his barn to *Candlemas-day* 1832, and stable for his horses, which is attached to the barn

“ *G. H.*

At the trial before *Tindal* C. J. at the last *shire* summer assizes, the agreement was produced stamped with a 1*l.* stamp, when it was objected by the defendant's counsel, that it should have been stamped with a 1*l.* 15*s.* stamp, inasmuch as it was in effect a surrender by the plaintiff of his interest in the estate. The chief justice overruled the objection, and the agreement was received in evidence. It appeared that the estate was not sold by the 1st of *August*, but portions of it were subsequently sold, of which the plaintiff gave up possession, and that the remainder was divided between the defendant and *R. P. Weddall* according to the agreement; such division, however, not being effected until *March* 1832, up to that period the plaintiff, at their desire, continued in possession of the part unsold, when he quitted it and became tenant to *R. P. Weddall* of the lands sold to him. The jury having found a verdict for the plaintiff, *Cresswell* in *Michaelmas* term obtained a rule for a new trial, on the ground urged at the trial that the agreement was improperly stamped; against v

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*Alexander and Wightman* (*Hoggins* with them) now showed cause. This instrument was not a surrender, but only an agreement to surrender. Several things were to be done, which might or might not be accomplished before the plaintiff was to give up possession; in fact the estate was not sold by the time named, although portions of it were subsequently disposed of, and the division of the remainder did not take place until long after the period fixed by the parties. If the agreement was not a surrender at the time it was signed, it would not require a surrender stamp; for the objection with respect to the stamp must be one that exists when the instrument is made. In *Williams v. Sawyer* (a), which was cited at the trial, the reason why the agreement between the landlord and the tenant was held to require a surrender stamp, was, because the landlord was to have immediate possession. [Parke B. No particular words are necessary by law to be used for making a surrender, if the intention of the parties sufficiently appears. That case is clearly distinguishable from this. Here the act is to be done *in futuro*. The tenant is to give up possession at *Michaelmas* on being paid 100*l.* How can it be a surrender until he is paid the 100*l.* ?] In *Parson's case* (b), where one by deed covenanted and granted to his lessor and two others to surrender his term at *Michaelmas* then next ensuing, it was held not to be a surrender. If this be a surrender, who takes under it? It is not a surrender to the defendant and *R. P. Weddall*, for they contemplated selling the property, and there cannot be a surrender to a future purchaser. [Parke B. There might be an *agreement* to surrender either to a future purchaser or to the reversioner.] It is laid down in *Viner's Abridgment*, tit. Surrender, G., pl. 35., that "it is not properly a surrender, but where

(a) 3 Brod. &amp; Bing. 70 ; 6 B. Moore, 226.

(b) Dyer, 374, b.

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he who surrenders gives possession to him who takes by the surrender. What possession was there given here? Again, in *Cruise's Digest* (a) it is stated, that "a surrender immediately divests the estate out of the surrenderor and vests it in the surrenderee," but there was no estate divested and vested in the present case. The conditions contained in this agreement prevent it from having the character of a surrender; and moreover they were not performed. It was decided in *Coupland v. Maynard* (b), that an agreement by a tenant to quit being conditional, and the condition not being performed, did not operate as a surrender. Supposing he had not paid the 100*l.*, could the defendant have maintained an ejectment against the plaintiff, have treated him as a trespasser? If this was a surrender he could. It is clear however that it was not but amounted only to an agreement to surrender; and it is consistent with that class of decisions which decide that an agreement to demise is not a demise.

*Cresswell contra.* The payment of the 100*l.* was not a condition precedent, and the plaintiff could not have retained possession until it was paid. After *Michaelmas*, if he had refused to go out, the landlord might have maintained ejectment. If they might, this was a surrender, since there was no other way in which the tenant's interest could be determined; for it is clear that the instrument was not a notice to quit. Although certain events might have prevented the surrender taking effect, yet, if they did not happen, it was still a surrender. [*Parke B.* Is there any authority that there may be a surrender with a condition precedent, which is not performed? It is clear from the agreement that the tenant is not to go out until the

(a) Vol. iv. p. 84, 4th edit. citing *Thompson v. Leach*, 2 Salk. 616 Show. Parl. Ca. 150.

(b) 12 East, 134.

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100*l.* is paid. Both parties might have to be ready at the same time, the acts might be contemporaneous, as in the delivery of goods, where one party cannot call upon the other for the goods without being ready to pay for them. Both the days for the sale and the division of the estate are antecedent to the time for giving up possession. We are to look at the agreement to see the intention of the parties.] As soon as the sale and partition were effected, the tenant was to be paid the 100*l.*, and he might thereupon have commenced his action to recover it, while he was not to quit possession until *Michaelmas*; so that the surrender and the payment of the 100*l.* were not connected, and the one was not conditioned upon the other. There being no notice to quit, there was no way in which the tenant's interest could determine at the time appointed, but by surrender. In a MS. case, which occurred in 1827, *Lady Galway's* tenants had signed a paper to leave their farms at the *Lady-day* following. One tenant refused to go out, and no notice to quit had been given. On ejectment being brought the point was raised, and the document was held to be a surrender. [*Parke B.* The question was argued at length in *Johnstone v. Hudlestone* (a), and it was there decided, that an insufficient notice to quit, which was accepted by the landlord, did not amount to a surrender by operation of law.] That case arose on a parol notice to quit, but here there was a note in writing; and there it may be inferred from the judgment of *Bayley J.*, that he thought there might be a surrender *in futuro*. *Coupland v. Maynard* only follows up what is laid down in *Shepherd's Touchstone* (b), that there may be a surrender, subject to a condition precedent as well as subsequent, and in that case there was a condition precedent. [*Parke B.* Admitting that the words used

(a) 4 B. &amp; C. 922; see 1 M'Clelland &amp; Younge, 141. (b) Page 307.

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here are ambiguous, for it does not very clearly appear whether the payment of the money was to be a condition precedent, who is the person to whom the surrender is to be made? “A surrender *sursum reddit* <sup>to</sup> properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder (a).” Here it depends upon the contingency of the landlords continuing the reversioners, whether the term shall be yielded up to them. I entertain no doubt that there is no surrender where the possession is not certainly to be made to the landlord.] Assuming that a surrender must necessarily be immediate, it is submitted, that if a time arrives when an instrument operates as a surrender, then it ought to be stamped as such, if produced after that period. A deed without is just as good as with a stamp, except for the purposes of evidence, for an estate will pass by a conveyance that is unstamped; therefore if you discover the defect shortly before you have to produce the instrument, and you get it stamped, it must be stamped as it then operates.

PARKE B.—Whether the stamp is affixed when the deed is made, or afterwards, it must, on being given in evidence, be stamped according to its nature at the time of its execution. This is a very plain point, and the rule must be discharged.

ALDERSON and GURNEY Bs. concurred.

Rule discharged.

(a) Co. Lit. 337, b.

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The KING on the prosecution of REYNOLDS *against*  
BRIDGER.

UPON the trial of a traverse of a return to a writ of *melius inquirendum* in outlawry, before *Bolland B.*, at the *Middlesex* sittings after *Trinity* term 1832, a verdict was taken for the crown, subject to the opinion of the court on the following case :—

On the 14th of *September* 1769, *Robert Lathropp* being seised in his demesne as of fee of and in the capital messuage called *West Felton Hall*, and also all the farms, lands, and hereditaments, called *Felton Hall Farm*, situate respectively in the parish of *West Felton*, in the county of *Salop*, by his last will and testament, duly signed and published to pass real estates, devised the same unto *John Scott*, his heirs and assigns, to the use of his nephew, *Robert Lathropp*, for life; and from and after his decease, to the use of the first son of his said nephew, *Robert Lathropp*, lawfully begotten, with divers remainders in the said will mentioned. On the 1st day of *May* 1770, the testator died seised without having revoked or altered the said devise.

A party, in *January* 1815, was convicted of bigamy, and sentenced to be transported for seven years. In *April* following he made a conveyance by lease and release of certain lands in which he had a life estate. Held, that such conveyance was good against the crown, there having been no attainder.

On the 1st day of *April* 1785, *Robert Lathropp*, the testator's nephew, who had survived the testator, died, leaving *Robert William Felton Lathropp Murray*, his first son lawfully begotten, him surviving.

After the death of the said *Robert Lathropp*, the nephew, the said *R. W. F. L. Murray* levied a fine with proclamations of the aforesaid mansion, farm, lands, and hereditaments, and afterwards, on the 9th of *January* 1815, was convicted of bigamy, and sentenced to transportation for seven years.

On the 15th and 16th days of *April* 1815, *R. W. F.*

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*L. Murray* executed certain indentures of lease and release, assuming to convey thereby to the claimant, *Edward Bridger*, and his heirs, the said mansion, farm, lands, and hereditaments, for the life of him the said *R. W. F. L. Murray*.

On the 11th of *March* 1830, *John Edward Reynolds*, in a suit in which he was plaintiff, and *R. W. F. L. Murray* was defendant, then pending in the Court of King's Bench, obtained a judgment of outlawry against *R. W. F. L. Murray*, and afterwards sued out of that court a writ of *capias utlagatum*, tested the 28th day of *April*, 11 G. 4., 1830 upon which an inquisition was taken, finding that the outlaw had several pieces or parcels of land, but omitting to state what particular estate or interest the outlaw had in such lands.

A writ of *melius inquirendum et capias utlagatum* tested the 23rd of *May*, 1 W. 4., 1831, and returnable the 4th of *June* then next, was subsequently issued out of this court upon the application of the said *John Edward Reynolds*; to which the sheriff of *Salop* returned that the said *R. W. F. L. Murray*, the outlaw, at the time of the outlawry, and at the time of taking the last inquisition, was seized in fee of and in the said mansion, farm, lands, and hereditaments, and that the said sheriff seized the same into the hands of the king, by virtue of the said writ.

The defendant, *Edward Bridger*, appeared to traverse this inquisition, and averred the seisin, will, devise, and death of *Robert Lathropp* the testator, of the survivorship and subsequent death of *Robert Lathropp* the nephew, the survivorship of *R. W. F. L. Murray*, his entry and seisin pursuant to the said devise, and subsequent execution of the said indentures of lease and release, and traversing specially that the said *R. W. F. L. Murray* was at the time of the judgment of the

outlawry, or at the time of the taking of the inquisition, seised in fee of the said manor, farm, lands, and hereditaments.

The Attorney General replied, that the said *R. W. F. L. Murray* was seised in fee of the premises in question, in the terms of the traverse, upon which issue was joined; and further, that upon the 9th of July 1835, and before the conveyance to the defendant *Bridger*, the said *R. W. F. L. Murray* was convicted of bigamy, for having on the 25th of August 1801 married a second wife, his first wife being then alive, and was sentenced to be transported for seven years. To this defendant rejoined *nul tiel record*.

At the trial the prosecutor proved the levying of the fine with proclamations by the said *R. W. F. L. Murray* of the premises in question, in *Trinity* term, 41 G. 3, 1801, and also the conviction of the outlaw, as stated in the record; upon which the counsel for the defendant produced and proved the conveyance to the defendant by the outlaw, as heretofore mentioned.

Either party is to be at liberty to cite the record as part of this case.

The questions for the opinion of the court are:—1st, Whether the said *R. W. F. L. Murray* was, taking into consideration the records and facts as above stated, seised in fee of the premises in question, as stated in the inquisition; and 2nd, Whether, if the said *R. W. F. L. Murray* was not so seised in fee, the said defendant is entitled, under the circumstances, to traverse this inquisition.

If the court should be of opinion that he was so seised, or that the defendant was not entitled to traverse the inquisition, the verdict is to stand; but if of the contrary opinion, the verdict is to be entered for the defendant.

*J. Jarvis* for the crown. In this case it is for the

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defendant to make out his title. [*Parke B.* It is not put in issue unless you can establish that a conviction for bigamy renders a party incapable of conveying his lands.] If it appears on the whole record that the defendant has no title, the crown is entitled to the judgment of the court, for the property being in the hands of the crown by the seizure of the sheriff, the defendant must come and show his right to oust the crown in order to obtain his writ of *amoveas manus*. It is assumed on the face of these proceedings that a conviction for bigamy vests the estate in the crown by attainder. [*Parke B.* The only two issues are, first, whether *Murray* was seised in fee in 1831, upon which it is clear that he had only an estate for life; and secondly, whether he had been convicted of bigamy, and that was proved for the crown at the trial.] Under the 1 *Jac.* 1. c. 11., which made bigamy a felony punishable with death, a conviction for that offence would have been sufficient; for although the fourth section of that statute saved the escheat to the lord, yet it would not have prevented the profits from going to the crown during the life of the convict; 1 *Hale* P. C. 703; 2 *Hawkins*, c. 49. s. 29.; *Lovell's case* (a). [*Parke B.* Must there not have been an inquest of office? In *Doe v. Pritchard* (b) it was held, that an attainted felon could make a lease which is good against all parties but the king. The crown must divest a freehold estate either by actual entry or by a commission under the great seal.] Although it may be that now the profits of the land are no longer forfeited to the crown for the life of the felon, yet these indentures purport to convey immediately, and, at all events, the crown is entitled to a year, day, and waste.

Lord ABINGER C. B.—Unless you can make out

(a) 1 Salk. 85.

(b) 5 B. & Ad. 765.

that a conviction is an attainder, I do not see that you have any case.

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PARKE B.—There can be no forfeiture of lands without an attainder. A conviction alone is not sufficient (a). You have no case at all, and the judgment must be for the defendant.

BOLLAND and GURNEY Bs. concurred.

Judgment for the defendant.

(a) See 3 Inst. 55 ; 4 Comm. 386.

LANE and Another *against* BENNETT.

DEBT for goods sold and delivered, money lent, &c. Pleas (before the new rules), first, *nil debet*; and secondly, the statute of limitations, 21 Jac. 1. c. 16. Replication to that plea, that the defendant before and at the time when the said several debts and causes of action in the declaration mentioned, accrued to the plaintiff, was in *parts beyond the seas, to wit, in Ireland*; and that the defendant afterwards, to wit, on 1 January 1831, returned from the said parts beyond the seas into this kingdom; which said return of the defendant was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said several debts and causes of action: and the plaintiffs further say, that they commenced their suit thereupon in the action against the defendant within

*Ireland is still a place "beyond the seas," within s. 19 of 4 & 5 Ann. c. 16. so as to entitle a plaintiff to commence his action within six years after the defendant's first return from thence to England, notwithstanding the first article of the act of union, 30 & 40 G. 3. c. 67. s. 3., and the law amendment act, 3 & 4 W. 4. c. 42. s. 7., declaring Ireland not to be "beyond seas," within the meaning of that act, or of 21 J. 1. c. 16, (statute of limitations.)*

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six years after the defendant's said first return into the kingdom after the accruing of the said several debts and causes of action. Verification. Rejoinder, that at the time when the said several supposed debts and causes of action in the declaration mentioned accrued to the plaintiff, he, the defendant, was not in parts beyond the seas, &c. Issue thereon. The cause was tried under a writ of trial, in the sheriff's court of *London*, before Mr. Serjt. *Arabin*, on 29th April 1835. The defendant's letters, ordering goods from the plaintiffs, which were afterwards shown to be delivered, were dated from *Templemore* barracks and *Dublin*, in 1826 and 1827. The action was brought in 1833, and the plaintiffs had a verdict for 4*l.* 10*s.*

In *Easter* term last *Steer* obtained a rule for a nonsuit, or for judgment *non obstante veredicto*, on the ground that *Ireland* was not now a place beyond the seas within 4 *Ann.* c. 16. s. 19. *Erle* showed cause, and *Steer* supported the rule. The court (Lord Abinger C. B. *Parke*, *Alderson*, and *Gurney* Bs.,) took time to consider. Their judgment so completely embraces all the arguments adduced at the bar, that it would be improper to repeat them. It was delivered in this term by

LORD ABINGER C. B.—In this case, to a plea of the statute of limitations to a declaration for goods sold and delivered, the plaintiff replied that the defendant was, when the cause of action accrued, in parts beyond the seas, to wit, in *Ireland*; and it appeared on the trial before my brother *Arabin* that the defendant was in *Dublin* at that time; and the question is, whether *Ireland* be now a place “beyond the seas,” within the meaning of 4 *Ann.* c. 16. s. 19., which provides that if a defendant in certain actions, at the time of the cause of action accrued, shall be beyond the seas, the person entitled to such action shall be at liberty to bring his

action against such person after his return from beyond the seas, within the time specified in that act and the 21 Jac. 1. c. 16. *Ireland* before the union was unquestionably a place "beyond the seas." In *Nightingale v. Adams* (a) it was so ruled by Lord *Holt*, on consideration. It must, therefore, remain so still, unless the act of union or some other statute has otherwise provided.

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It was contended by the defendant that *Ireland* is not now a place beyond the seas, for two reasons; first, because it has been enacted not to be so by the statute 3 & 4 W. 4. c. 42. s. 7. There is a similar clause in 3 & 4 W. 4. c. 27. s. 19., but applicable to that act only: secondly, because it ceased to be so by the act of union.

The statute 3 & 4 W. 4. c. 42. s. 7. provides that no part of the united kingdom of *Great Britain* and *Ireland*, nor the Islands of *Man*, *Jersey*, *Alderney*, and *Sark*, &c. being part of the dominions of his Majesty, shall be deemed to be beyond the seas, within the meaning of this act, or of the act 21 Jac. 1., intituled "An Act for Limitation of Actions and for avoiding Suits at Law." This clause, it will be observed, altogether omits to mention 4 & 5 Ann. c. 16. s. 19., and therefore it cannot have the effect of altering or explaining the meaning of the words "beyond the seas" in that act, unless we are able to give such a construction to the clause in question, in furtherance of the intention of the legislature, as to include it: or unless this section of the statute of *Anne* can be considered in some sense as an appendix to or part of the statute 21 Jac. 1., and virtually included in any statutory explanation of it.

We cannot, we think, put any such construction on

(a) 1 Show. 91.

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3 & 4 W. 4. c. 42. s. 7. as to include the statute of *Anne*, when another statute is expressly mentioned: the words are precise and clear, and incapable of being construed to include any other statutes by any latitude of construction; and, besides, we cannot predicate with certainty that the legislature really meant to include the cases provided for by the statute of *Anne*; for some reason may be given, and was given at the bar, for excluding them. The great probability however is, that the omission to name the statute 4 & 5 *Anne*, is an oversight: but even if we were quite satisfied that it was so, we could not supply the defect. “A *casus omissus* can in no way be supplied by a court of law, for that would be to make laws,” *per Buller J.* 1 T. R. 72.

The next question then is, whether the statute of *Anne*, or rather s. 19 of it, can in any way be considered as an extension of or appendix to the statute of 21 *Jac.* 1, and virtually included in it. We think it cannot; for it is not part of any act for the amendment or exposition of the statute of *Jac.* 1; it is part of a general statute for the amendment of the law, containing numerous provisions affecting many branches of the law; and the statute of *Jac.* 1. is referred to in this section not as a statute to be explained, but merely to incorporate, by reference, the times fixed by that statute. The case of *Bayley v. Marin* (a), cited at the bar, differs from this, because there the 14 *Eliz.* c. 11., which Lord *Hale*, in opposition to two other judges, considers as an appendix to the 13 *Eliz.* c. 10., was intituled “An Act for the continuation, explanation, perfecting, and enlargement of divers Statutes,” and amongst others applied to the 13 *Eliz.* c. 10; and besides the 18 *Eliz.* c. 11, which he thought extended to concurrent leases

(a) 1 Vent. 244.

anted under 14 *Eliz.*, merely recited the 13 *Eliz.*, it contained general words applicable to all leases, whether granted under one statute or another. If the 8 *Eliz.* had enacted, that concurrent leases granted under the statute 13 *Eliz.* c. 10. should be good, it would have been more applicable to the present case; but it does not. For these reasons we are of opinion that the statutes 3 & 4 *W. 4.* cannot be construed to extend to the 4 *Anne*, c. 16.

The remaining question is, whether the act of union had the effect of causing *Ireland* to cease to be a "place beyond the seas," within the meaning of the statute of *Anne*? Lord *Coke*, 1 *Inst.* 260 b., in his *Commentaries* on *Littleton*, s. 439, who speaks of one out of the realm in the king's service, explains that passage by the words "out of the power of the king of *England*, as of his crown of *England*," and referring also to s. 677, where *Littleton* uses the words "*ouster le mere*," has this commentary and note, "*Littleton* saith, not beyond the sea or *extra quatuor maria*, for a man may *intra quatuor maria*, and yet out of the realm of *England*: but *infra quatuor maria* or *extra* is taken by construction to be within the realm of *England*, or the dominions of the same." From which it appears to have been the opinion of Lord *Coke* that the expressions were, in effect, synonymous; and the phrases, "beyond or within the seas," or "out of or in the realm," have been used indiscriminately in different statutes. By 18 *Ed.* stat. 4. *modus vendi fines*, fines conclude such as are "within the four seas;" and it appears from a case cited by Lord *Dyer*, *Plowden*, 376, that *Scotland* was "beyond the seas," within the meaning of this statute. The 1 *Ric.* 3. 7. relating to fines, uses the expression "out of the land." The 4 *Hen.* 7. c. 24. has the same expression, and *Ireland* has been held to be "out of the

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land" under that statute, *Calvin's case* (a). The 27 *Eliz.* c. 9. s. 111. has the phrase "beyond the seas." The statute of limitations, 32 *Hen.* 8. c. 2. s. 8., uses the words "out of this realm of *England*;" and the statute 21 *Jac.* 1. c. 16. s. 2., "beyond the seas." However in the case of *King v. Walker* (b), the court of King's Bench considered that the terms were not synonymous, and that the expression "beyond the seas" was properly introduced to meet the case of *Scotland*, and decided that that kingdom was not beyond the seas; and this decision is in accordance with *Jenkins's Centuries, First Century*, Case 18, where after stating that if the husband be in *Ireland* or *Scotland* for a year, and the wife in *England* during this time has issue, this issue is a bastard; it is said that it seems to the reporter, "that at this day it is otherwise for *Scotland*; for both are become under one king, and they make one continent of land." If then the expression "beyond the seas," in the statute of 21 *Jac.* 1 and 4 *Anne*, c. 16. is to be taken in a different sense from the words "out of the land," or "of the realm," and to refer to locality, *Ireland* still remains so notwithstanding the act of union; for that act does not contain any provision to the contrary. If, on the other hand, these expressions are to be construed as equivalent, and "beyond the seas" in the statutes of *James* and *Anne* means "out of the realm," that is, out of the realm of *England*, the act of union does not bring *Ireland* within that realm, or make it parcel thereof, or declare that it shall be so considered; but it forms one new united kingdom of both, and provides that all the laws then in force in each shall remain as by law established in each. Any one therefore in *Ireland* is still

(a) 7 Coke, 19.

(b) 1 Sir W. Black. 286.


out of that which was the realm, as contemplated by the two statutes 21 *Jac.* 1. and *Anne* (supposing beyond the seas and out of the realm to be synonymous), although *England* has ceased to be a separate kingdom. We, therefore, think that *Ireland* is not by the act of union itself constructively brought within the limits of the four seas, or made part of the realm of *England*. And this view of the case is sanctioned by the seventh clause in 3 & 4 *W.* 4., c. 42. which is an enacting and not a declaratory clause, and shows the opinion of the legislature, that without such a clause *Ireland* would still be beyond the seas. The cases which have been decided on the writ of *ne exeat regno* are also authorities to the same effect; for they were decided on the ground that, notwithstanding the union, *Scotland* was still “out of the realm” within the meaning of the writ; the operation of which was not affected by the union; *Done’s* case (a); *Bernal v. Marquis of Donegal* (b); but in *Done’s* case the condition of the recognizance was altered to exclude the power of going to *Scotland*, which otherwise, at the time, would have been included in what then was the realm. The rule for a new trial must therefore be discharged.

Rule discharged (c).

(a) 1 P. Will. 262.

(b) 11 Ves. jun. 46.

(c) See *Battersby v. Kirk*, 2 Bing. N. C. 584.

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ASLETT *against* ABBOTT.

A declaration upon a bill of exchange stated, that on a certain day the plaintiff made his bill of exchange payable one month after date, "which period has *now* elapsed," following the form given in the rule of *Trinity* term, 1 *Will.* 4. Sched. No. 4. The declaration was specially demurred to, on the ground that it did not appear that the bill was due at the time of commencing the suit, and that it was consistent with the allegation in the declaration that the bill became due after action brought. The court refused to set aside the demurrer as frivolous.

*Seemle*, that since the uniformity of process act, the above form is bad on special demurrer.

**A**SSUMPSIT by the drawer of a bill of exchange, payable to his own order, against the acceptor. The declaration pursued the form given by the rule of *Trinity* term, 1 *Will.* 4, Schedule, No. 4., and stated that the plaintiff, on a certain day, made his bill of exchange payable one month after the date thereof, "which period has *now* elapsed."

Special demurrer, assigning for cause, that the declaration did not allege that the time for which the bill had to run was elapsed at the time of issuing the writ and the commencement of the suit, and that it was consistent with the allegation in the declaration that the bill became due after the commencement of the suit.

*E. V. Williams* applied for a rule to set aside the demurrer as frivolous, and to sign judgment as for want of a plea, pursuant to the rule of *Hilary* term, 4 *Will.* 4. No. 2. He submitted, that the plaintiff had followed the form prescribed by the judges verbatim, and that there was no ground for the objection raised by the demurrer.

PARKE B.—The date of this form is previous to the uniformity of process act, 2 *Will.* 4. c. 39., which makes all the difference. At the time that the rule of *Trinity* term, 1 *Will.* 4. was framed, the form was quite correct in actions by bill, but under that statute it is no longer correct. The form would have been open to question on a proceeding by original, because it might have been, that the time had elapsed between the issuing of the writ and the declaration; but not in an action by bill, in which the declaration was the commencement of the suit. In this case, the plaintiff

knew that proceedings by bill were at an end. If he had stated, that the defendant made his bill of exchange *bearing date* on such a day, the objection would have been cured, and that was the old form. Formerly, in well-drawn declarations, if you stated that the bill was made on a certain day, which exposed you to the risk of a variance, it was sufficient to aver that it was payable so many months after the date; but if you did not set out the date with certainty, in order to avoid a variance, then you must have alleged that the time for payment had elapsed before the commencement of the suit. We cannot set aside this demurrer as frivolous, and you had better consider whether you should not amend (a).

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*Per Curiam.*—(Lord ABINGER C. B., PARKE, BOL-  
LAND, and GURNEY Bs.)

Rule refused.

(a) The plaintiff amended his declaration, by inserting the words, “which period had elapsed before the commencement of this suit.”

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JAMES and Another, Assignees of ARTHUR EMERSON a  
Bankrupt, *against* GRIFFIN and HILLHOUSE.


TROVER for lead, the conversion being laid subse- Goods were  
quent to the bankruptcy. First plea, that one consigned to  
A. in London.

On the arrival of the vessels in the river, the captains being urgent that the goods should be taken out, applied to A., who was then insolvent, and who at first refused to give any directions, but ultimately, to accommodate the captains, gave his son a verbal order to land the goods at a wharf, where he had been in the habit of landing goods under written orders, at the same time declaring that he would not take the goods in question. A. had no premises of his own on the river, but had a warehouse in the city. The goods were landed on the wharf and piled away, and while in the hands of the wharfingers were stopped *in transitu*, shortly after which A. became bankrupt.

Held, in trover, by the assignees of A. against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers took possession of the goods for A. as owner, or for the benefit of the vendor.

Held also, that the declaration made by A., that he would not accept the goods at the time he gave his son orders to land them, was admissible in evidence, although was not communicated either to the wharfingers or the vendor.

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*John Stagg*, being a trader carrying on business at *Stockton-upon-Tees*, in the county of *Durham*, heretofore, and before the said *A. Emerson* became bankrupt, to wit, on the 1st of *December* 1834, bargained for and agreed to sell upon credit to the said *A. Emerson*, he then being a trader residing and carrying on business in *London*, the said goods and chattels in the said declaration mentioned, at and for certain price then agreed upon by and between the said *John Stagg* and *A. Emerson* in that behalf, and which said goods and chattels were, according to and in pursuance of the said bargain, to be sent by the said *John Stagg* from *Stockton-upon-Tees* aforesaid and carried and conveyed and delivered to *Emerson* at *London* aforesaid. And the defendants further say that the said *John Stagg* afterwards, to wit, on the same day and year aforesaid, sent the said goods and chattels by a common carrier from *Stockton-upon-Tees* aforesaid, to be so carried and conveyed and delivered as aforesaid, and which said goods and chattels afterwards, and at the time of the stoppage hereinafter mentioned, were in possession of the defendants (they being wharfingers) in the course of such carriage and conveyance. And the defendants further say, that before the arrival of the said goods and chattels in *London* *A. Emerson* became wholly insolvent and unable to pay the said *John Stagg* for the said goods and chattels whereupon the said *John Stagg*, whilst the said goods and chattels were in the possession of the defendants as aforesaid, and before the delivery thereof to the said *A. Emerson*, stopped the said goods and chattels and required the defendants to hold possession thereof for him the said *John Stagg*, whereof the said *A. Emerson*, before he became bankrupt, and the plaintiffs assignees as aforesaid, afterwards had notice. And the defendants further say, that the price of the said goods and chattels is still wholly unpaid to the said

*John Stagg*, wherefore the defendants, after the plaintiffs were so appointed assignees as aforesaid, by the direction and under the authority of the said *John Stagg*, refused to deliver the said goods and chattels to the plaintiffs, but delivered possession thereof to certain persons, to wit, Messrs. *Pilcher & Co.* for the said *John Stagg*, as they lawfully might for the cause aforesaid, and which is the conversion in the said declaration mentioned. Verification. There was a second plea, denying that the plaintiffs, as assignees, were possessed of the goods; on which issue was joined.

Replication to the first plea, that after the said goods and chattels in the declaration mentioned had been and were sent by such common carrier as aforesaid, to be carried and conveyed and delivered as aforesaid, to wit, on the 11th of *December* 1834, the said goods and chattels came into the possession of and were received by the defendants *as agents and wharfingers of and for* the said *A. Emerson*, to wit, at *London* aforesaid, and the defendants then held the same as such agents and wharfingers of and for the said *A. Emerson* and for his use and benefit, and the delivery thereof to the said *A. Emerson* then was complete; and the plaintiffs further say, that the said *John Stagg* did not stop the said goods and chattels, or any or either of them, or any part thereof, or require the defendants or either of them to hold possession of the same, or any part thereof, for him the said *John Stagg*, at any time before the defendants received and held the said goods as such agents and wharfingers of and for the said *A. Emerson* as aforesaid, or before the delivery thereof to him was complete as aforesaid. Issue was joined on his replication.

At the trial before Lord *Abinger* C. B., at the sittings *London* after *Trinity* term, the following facts appeared. In *November* 1834, Mr. *Stagg*, who was the manag-

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carrying on business in *Laurence Pountney* don, where he had a counting-house and a  
The vessels arrived in the port of *London* on the 7th of *December*. On the 8th, and the 9th, the captains of both ships called at counting-house, where they saw his son, and desirous that the lead should be immediately captain of the *Fanny* offering to pay the li the lead on board of his vessel, as he was at some other goods which were stowed. The son communicated what passed on both to the father, who each time refused to give. On the 10th the captains renewed their application then *Emerson* told his son to go on board and direct the captains to land the lead at *Be* which belonged to Messrs. *Griffin* and *H* defendants, and was situate nearly opposite place where the ships were lying. *Emerson* in the habit of using this wharf for land (written orders) goods consigned to him, and afterwards sent his own cart to carry them to house. On leaving the vessels the son went to wharf, where he saw the defendant *Hillhouse* him that the lead was about to be landed answer to a question from *Hillhouse*, if it carried away, the son said he did not know;


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affairs, and that on being informed by his son of the applications of the captains, he at first refused to give any directions at all, but at length gave his son a verbal order to land the goods for their accommodation, telling his son that he did not mean to take them. On cross-examination he said, that it was on account of his embarrassed circumstances that he would not meddle with the goods. The son, who was examined on the part of the plaintiffs, also stated, that his father, when he gave him directions to land the goods, told him, that he did not intend to take them, but such intention was not communicated to the defendants. In the course of the same day, the 10th of *December*, the lead was lightered from both vessels into a barge belonging to the defendants, and landed at *Beale's* wharf, where it was piled up. The lighterage of the lead from the *Fanny* was paid by the captain, pursuant to his agreement. The *Fanny* had been in the habit of landing goods at the wharf. On the 16th a bill was presented to *Emerson*, drawn by *Stagg*, for the price of the lead, which the former refused to accept. On the same day *Stagg*, in consequence of rumours of *Emerson's* insolvency, wrote to the defendants, who received the letter on the 18th, authorizing them to stop the lead. On the 22nd a fiat issued against *Emerson*, under which he was duly declared a bankrupt, and the plaintiffs were appointed his assignees. Both the freight and the wharfage of the goods remained unpaid.

The Lord Chief Baron, in summing up, told the jury that the question for their consideration was, whether or not the defendants received the lead as the agents and wharfingers of *Emerson*; if they did, that then in point of law it was in his possession, and their verdict ought to be for the plaintiffs; but if the defendants did not receive the lead as *Emerson's* agents, or re-

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ceived it in a doubtful character, then that they should find for the defendants. His lordship also stated it as his opinion, that the intention of the bankrupt in landing the goods was immaterial, not having been communicated to the defendants; but he gave the defendants leave to move to enter a nonsuit in case the court should think that the intention of *Emerson* made any difference. The jury found a verdict for the plaintiffs damages 350*l.* 13*s.* 8*d.*

In *Michaelmas* term Sir *W. Follett* obtained a *re-nisi* for a new trial on two grounds; first, that the *transitus* was not complete by the delivery of the goods to the defendants; and secondly, that the bankrupt had put an end to the contract of sale before the bankruptcy.

Sir *F. Pollock*, *Kelly* and *Hoggins* showed cause. The question in this case is, whether the *transitus* was at an end, and that depends upon whether the defendants had received the goods as the agents and on the behalf of the bankrupt. [*Parke* B. That is not exactly the question; it is, whether the defendants received the goods as agents to forward them, or as the ultimate receivers. Lord *Abinger* C. B. If the wharfingers received the goods as agents to cart them away, the *transitus* was not at an end. The first issue raises the question, whether the defendants held them as final agents.] The circumstance of the party having to forward the goods makes no difference. In *Dixon v Baldwen* (a), where goods were ordered to be sent to *Hull* for the purpose of being afterwards shipped to *Hamburgh*, it was held, that as between the vendor and vendee, the *transitus* determined when the goods arrived at *Hull*. So in *Ellis v. Hunt* (b), where goods were sent by a waggon, and the assignee of a vendor

(a) 5 East, 175.

(b) 3 T. R. 464.

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consignee employs him, surely the *transitus* is at end.] As between the consignor and consignee, no further carriage of the goods was intended after their arrival in the river. It is not necessary that there should be an actual delivery into the hands of the consignee himself, for if the goods are received by an agent duly authorized, the *transitus* is determined. The captains of the vessels sent to the bankrupts, and desired him to take the goods away; if the delivery to the lighter-man was not the termination of the *transitus*, why did they send to the bankrupt at all? That could only be because their duty was confined to a delivery on the river, for otherwise they should have landed and forwarded the goods without waiting for any instruction from Emerson. It is submitted that the *transitus* was at an end as soon as the goods were put into the lighter, for if not the wharfingers would have had to forward them somewhere else. But here the son gave the defendants directions to pile the goods away, and they remained at the wharf at the risk and expense of the bankrupt. If a man chooses to receive goods at a wharf instead of his own warehouse, the *transitus* is determined; and although the bankrupt had a warehouse, he might, if he pleased, make a warehouse of the wharf. The goods were received by the wharfingers on the account of the bankrupt, and entered in his name in their books. No case has gone the length of saying, that goods landed at a wharf, and received by the wharfingers under the order of the consignee, still continue to be the property of the consignor. If an agent gives goods furnished on his credit a new direction in furtherance of the usual course of business of the principal, they are within the order and disposition of the latter, so as to pass to his assignees if he becomes bankrupt; *Hawkes v. Dunn* (a).

(a) 1 Tyr. 413.



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Secondly, with respect to the bankrupt's intention not to receive the goods, it may be admitted that if, instead of giving directions to land the goods, he had sent a message to repudiate the contract, the assignees would have had no claim. But it is submitted, that where the direction to land the goods was unaccompanied by any intimation to the wharfingers that they were not to receive them for him, something passing in the mind of the bankrupt cannot be afterwards brought forward to change the character of the act; neither can a communication between the father and son, which is not bound up with the act, affect it. A person in insolvent circumstances is not to be allowed to play fast and loose by giving orders to a wharfinger to receive goods, and yet have a secret intention not to take them, which he may bring forward or not afterwards. No intention can be of the slightest avail unless incorporated with the act. There is no case in which an unexpressed intention has been allowed to operate; the effect of so allowing it would be to leave it in every case uncertain whether the goods were the consignor's or the bankrupt's. The other side must make out two things; first, that the intention was receivable in evidence, and also that it altered the character of the act. [Lord Abinger C. B. If the effect of the act was to create a certain relation between the wharfingers and the bankrupt, could that be affected by an intention declared afterwards? There are only two cases in the books in which the question turned upon the intention of the vendee in receiving the goods, namely, *Atkin v. Barwick* (a), and *Mills v. Ball* (b), and in both of them the intention was expressed by letter and at the time. Here, if the bankrupt had expressed his intention at the time, either to the wharfingers or to the vendor by letter, there would have been no delivery of the

(a) 1 Strange, 165.

(b) 2 Bos. &amp; P. 457.

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goods to him. *Parke B.* It is clear that the intention of a party may be proved from what he says, and laid before a jury in the same way, as if it was to be inferred from circumstances. The question is, whether that intention affects the act when not expressed. Suppose that it was fully made out by facts that the bankrupt had no intention to receive the goods, but those facts were not communicated to the wharfingers, what then? The goods would belong to the assignees. If a man receives goods from a consignor, his intention in receiving them should be openly declared at the time, for it will be laying down a very dangerous principle if, where a man deals with goods as his own, he is to be allowed afterwards to give evidence of a secret intention, which is to alter or destroy the rights of other parties. [*Parke B.* Assuming that the bankrupt had no intention to receive the goods, then neither the lighterman nor the wharfingers were his agents for that purpose. The only question is, whether an intention undeclared is to have that effect. The case is the same as if instead of proving it by the bankrupt's evidence, which may be supposed to be given with a particular intent, you had proved it by other circumstances. The danger of admitting such evidence is merely matter of observation to the jury.] There is no authority that such an intention may be received. It is submitted that here *transitus* was at an end, and that an unexpressed intention cannot vary the effect of the act done.

At any rate the intention is wholly immaterial on the first issue, under which the question is, whether the goods were still in a course of transit or not; if *transitus* was determined, it is clear that the plea is not supported. On the second issue, if it be assumed that the goods were delivered to the bankrupt, then indeed the question may arise, whether an undeclared

intention can alter the rights of the parties, and re-vest the property in the vendor.

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Sir W. Follett and Alexander (Martin with them,) in support of the rule. The *transitus* was not determined by the delivery of the goods to the defendants, which remained with them as a medium of communication between the consignor and consignee. The bankrupt having no premises of his own adjoining to the river, necessarily had his goods landed at some public wharf: and it was proved that his usual course of proceeding was to land his goods, under written orders, at different wharfs, from whence they were almost immediately taken away to his warehouse. In the present case the bankrupt departed from his usual course, both in not giving a written order to land the lead and in not taking it away immediately. According to the evidence he might have had it landed at any wharf he pleased, and his directing it to go to *Beale's* wharf is wholly immaterial, for if he had sent an order down to *Stockton* that it should be landed there, the *transitus* would not have been at an end. Supposing a tradesman orders goods at *Stockton* to be sent to *London*, and directs them to be landed at a particular wharf, the *transitus* is not determined until they reach his own warehouse. If, indeed, the bankrupt had sent his own lighter, or done any other act to take possession of the goods, the case would have been different, but it is otherwise where he acts through lightermen and wharfingers, who are the medium by which the goods are to be conveyed to their ultimate destination. [*Parke B.* In *Bohtlingk v. Inglis*(a) it was held, that the consignor might stop goods while in *transitu*,

(a) 3 East, 381.

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which were shipped on board of a ship chartered by the vendee.] If goods are in the hands of wharfingers, the presumption is that the *transitus* is continuing. [Parke B. I do not know that the cases go so far as that; packers and wharfingers are doubtful characters. There is no presumption from the authorities either way.] Though no rule is laid down, it may be collected from the decisions that the *transitus* continues. The question is not whether the property in the goods passed to the bankrupt, and they were at his risk and expense, for they became his property in a certain sense when they were shipped on board the vessels; neither is it whether the defendants were the agents of Emerson, for in every case the carrier is the agent of the consignee, and holds the goods at his risk, yet that does not defeat the right of the consignor to stop *in transitu*. The question is, what is the ultimate destination of the goods. In *Dixon v. Baldwin*, the vendee had an agent at Hull, who retained the goods, which might be sent by the vendee to different parts of the world. That is a different case from one in which a further *transitus* is originally impressed on the goods. [Lord Abinger C.B. Where goods are landed at any of the docks the *transitus* is at an end.] Goods landed at a wharf are not retained there as they are in a dock warehouse. The bankrupt having a warehouse of his own did not require the wharf as a warehouse; and therefore unless he gave some particular order to the wharfingers, the *transitus* was not determined. The real question which ought to have been left to the jury was, whether the defendants were the bankrupt's agents to store or to forward the goods. As to the goods being deliverable in the river, the contract to deliver there was between the owners of the vessels and the vendee, and there was no agreement by the vendor to deliver them in any specified place.


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With regard to the intention of the bankrupt, it was proved by the son, who was called by the other side to speak to the directions given him by his father to land the lead, that when he gave him those directions he at the same time declared that he would not meddle with the goods. The delivery to the wharfingers therefore did not complete the *transitus*, for the son's evidence clearly established that the order to land the lead was merely given to accommodate the captains of the vessels; and the declarations of *Emerson* show that he did not mean to accept it, or to make the wharfingers his agents to store it away. Such declarations were admissible in evidence. [Lord Abinger C. B. The bankrupt's intentions were in evidence from the son, and therefore the material question to consider is, whether they should have been communicated to the wharfinger or not.] According to the usual course of business the defendants were the agents of the bankrupt only to forward goods, and consequently there was no necessity to inform them that they were not to keep the lead, which they received in their ordinary character of wharfingers in order to be forwarded. Lastly, it is submitted that the declarations made to the agent employed to land the lead limited his authority to see it so landed, not for the benefit of the vendee but of the vendor.


Lord Abinger C. B. — The true point to be considered in this case is, whether what the bankrupt did was a taking possession of the goods by himself or his agent. The rest of the court seem to be of opinion that what the father said to the son respecting his intentions not to accept the goods was admissible in evidence. However it was in fact received, and the defendants had the benefit of it with the jury; so that on that point alone there is

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no ground for a new trial. Supposing the wharfingers were the agents of the bankrupt, yet it might be a question whether, under the circumstances, the taking possession put an end to the right to stop in transit. A specific declaration, capable of proof, by a vendor, that he will not receive the goods, may give a title to a vendor against the assignees of the vendee, as *Mills v. Ball*. There the goods had arrived at a wharf, and were received by the wharfinger on account of the consignee, but he repudiated the possession in consequence of the deranged state of his affairs; and it was held that the vendor's right to stop the goods continued. A case may be conceived where even a receiving of goods into the vendee's own warehouse would not be a taking possession; as where a party knowing that he must inevitably become bankrupt, puts them apart from his other goods, with the view of returning them to the vendor. In the present case the bankrupt had come to a resolution not to receive the goods, but being pressed by the captains he was induced to direct his son to have them landed, but at the same time declared that he did not intend to meddle with them. From his desiring the goods to be taken to the wharf under these circumstances, it appears that he did not mean to take possession of them for himself, but for the benefit of the vendor. The question, therefore, which ought to have been submitted to the jury was, whether the defendants took possession of the goods for the bankrupt as owner: whereas the question I left was, whether they took possession of the goods as his agents. If I had qualified that by leaving it to the jury to say whether, supposing the wharfingers to be the bankrupt's agents, they received the goods for his benefit, or only to keep for the vendor, the jury might have found a different verdict. I therefore think that the defendants are entitled to a new trial.

PARKE B.—It seems to me that the proper question to be left to the jury was, whether the act of the son was, under the circumstances, a taking possession by the bankrupt, as owner. If it was, the *transitus* was at an end; but if not, and he only meant to take possession for a limited purpose, namely, for the benefit of the vendor, the *transitus* was not determined. According to the evidence the latter appears to have been the case, for the son seems to have had authority to land the goods for such limited purpose only.

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ALDERSON B.—In order to defeat the right to stop *in transitu*, one of two things must appear, either the goods must arrive at the end of their journey, in which case I should have a doubt whether the intention of the bankrupt in receiving them would be material; or where they have not reached their journey's end, something must occur which amounts to a taking of possession by the vendee; and in that case it becomes necessary to inquire what the act is that has been done, and the intention with which it was committed. In the present case it is requisite to ascertain what act was done by the bankrupt to put an end to the *transitus*. It seems to me that the evidence of the son, as to the declarations of the father, was material to prove what the intention of the bankrupt was in giving directions for the landing of the goods, and thereby to show whether the son had authority to determine the *transitus*. The question for the jury was, whether the act done was a taking possession by the bankrupt as owner, or for the benefit of the vendor.

Rule absolute.

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1836.

FOSBROOK *against* HOLT and Others.

An action brought against two magistrates for an act done in the execution of their office, was discontinued on the 3d *December*, and on the following day their attorney attended the taxation of their costs, when single costs only were allowed. The attorney afterwards applied to the master to alter his allocatur by marking double costs, under the 7 *Jac.* 1. c. 5., which he stated he could not do without a rule of court. During the same day the attorney made an application to the plaintiff's attorney to allow double costs, which the latter would not do. On the 8th *January* single costs were tendered and refused. On the 20th *January* the plaintiff attorney offered to go before the master and agree that he should allow the defendants double costs, but their attorney then insisted on having a consent to a judge's order to enter a suggestion. The plaintiff had commenced a second action on 13th *January*. The defendants having obtained a rule why they should be at liberty to enter a suggestion to entitle them to double costs, the court charged the rule, on the ground that they might have obtained such costs without applying to the court.

*Semble*, that a suggestion is unnecessary to entitle a defendant to double costs under the 7 *Jac.* 1. c. 5.

**T**HIS was an action against two of the defendants, who were justices of the peace, for an act done by them in the execution of their office. On the 3d *December* a rule to discontinue the action was served upon their attorney, who, on the following morning, attended the taxation of their costs, when the master taxed them single costs only. The attorney did not request the master to mark double costs at the time, but in the course of the day he applied to him to alter the allocatur by allowing double costs. The master stated that he could not do so without a rule of court. On the same day an application was made to the plaintiff's attorney to allow the double costs, which he refused to do, whereupon a judge's summons was taken out, which was heard before Mr. Baron *Bolland* at chambers, who discharged the summons, on the ground that it was not supported by any affidavit. On the 8th the plaintiff's attorney made a tender of the single costs, which were refused, and he was informed that it was intended to apply to the court for double costs. On the 15th *January* the attorney for the defendants wrote to the plaintiff's attorney to say that he had received an affidavit whereon to ground an application to the court to enter a suggestion to entitle the defend



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ants to double costs, but was unwilling to make the application unless compelled to do so by the plaintiff refusing to pay them. On the 18th a clerk of the plaintiff's attorney left word at the office of the defendants' attorney, that the plaintiff would consent to pay the double costs, and on the 20th he saw the attorney himself, and offered to attend the master and agree to his allowing double costs. The defendants' attorney declined, and then insisted on having a consent to a judge's order to enter a suggestion. The plaintiff had commenced a second action against the defendants on the 13th January. *Cresswell* having obtained a rule nisi why the master's allocatur should not be vacated, and why the defendants should not be at liberty to enter a suggestion on the roll to entitle them to double costs, under the 7 Jac 1. c. 5., and why they should not be allowed their costs in pursuance thereof,

*Higgins* now showed cause. The attorney for the defendants having made no objection at the time the master taxed them single costs only, their right to double costs was waived. At any rate the court will not entertain this application after the refusal of the offer made by the attorney for the plaintiff to go again before the master and consent to double costs. Moreover, it is submitted that the defendants are not entitled to double costs in point of law. The words of the 7 Jac. 1. c. 5., relating to the costs of actions brought against justices of the peace, are, "that if the verdict shall pass with the said defendant or defendants in any such action, and the plaintiff or plaintiffs therein become nonsuit or suffer any discontinuance thereof, that in every such case the justice or justices, or such other judge before whom the said matter shall be tried, shall by force and virtue of this act allow unto the defendant or defendants his or their double costs." These words

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show that the statute contemplates a trial or a discontinuance after trial, which there may be, in order to entitle a defendant to costs; for how can they be allowed by the judge who shall try the action unless it has been heard? It is true that in *Devenish v. Mertins* the court allowed double costs in the case of a discontinuance before trial, but that was done on the ground that, as the plaintiff could not discontinue without the leave of the court, they might impose terms upon him, and the present objection was not raised. At all events, although double costs were allowed in that case, the court refused to permit it to be done by way of suggestion. Here, what the defendants seek is not the double costs, which they refused to take, but a suggestion on the roll, which they conceive may be useful to them at the trial of the second action.

*Cresswell contra.* The defendants are clearly entitled to have this rule made absolute, so far as relates to their being allowed double costs. It is said that the discontinuance spoken of by the statute must mean one that has occurred after the action has been tried, but it is difficult to conceive how a discontinuance can then take place; and *Devenish v. Mertins* shows that a defendant has a right to double costs upon a discontinuance before trial. Then, if these defendants are entitled to double costs, why not by way of suggestion? [*Parke B.* A suggestion is not required. It is necessary under a court of requests act, where, although a plaintiff has recovered a verdict, yet the defendant is entitled to costs on account of the plaintiff being a resident within the jurisdiction, and having recovered less than 40s., because otherwise there would be an inconsistency on the record; but where the question is merely the amount of costs, it is unnecessary to state upon the record that the party is

to be allowed double costs, or to have a suggestion. If double costs are taxed generally as costs, there is no error. Lord *Abinger* C. B. Why do you want a suggestion?] It is submitted that the defendants are not bound to state a reason; but it may be that they wish for a suggestion, in order to save them expense at the trial of the second action. It is only reasonable that they may be able to prove that the action is brought against them in their character as magistrates. [Lord *Abinger* C. B. There is no instance where, in a case like the present, a suggestion has been allowed, and there is no occasion for one.] A case is mentioned in *Hullock* on Costs, in which a suggestion was allowed to be entered. [*Parke* B. A suggestion is very often entered unnecessarily.] The entry of a suggestion can work no wrong to the plaintiff. If it is not evidence in another action he will not be prejudiced, and if it is, he ought not to object to its being used against him.

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LORD ABINGER C. B.—I think that this rule ought to be discharged with costs. The defendants might have obtained their double costs without coming to the court.

PARKE B.—I am also of opinion that this rule must be discharged with costs. The defendants might have had their costs, for which a suggestion was unnecessary. The plaintiff offered to consent that the master should allow them double costs.

BOLLAND and GURNEY Bs. concurred.

Rule discharged (a).

(a) See *Anon.* 2 Barnard. 171; *Anon.* 2 Vent. 45; *Grindley v. Holloway*, Doug. 307; *Harper v. Carr*, 7 T. R. 448.

1836.

PENPRASE *against* CREASE.

The court will not compel a plaintiff in his particulars to furnish an account of the sums received by him from the defendant, but only to state the balance for which he is proceeding.

**T**HE plaintiff had been the toller for eight years of certain tolls of tin, held by the defendant as lessee under the duchy of *Cornwall*, and the action was brought for work and labour, and for money paid by the plaintiff, during that period.

*Butt* applied for a rule calling upon the plaintiff to deliver to the defendant an account of all sums received by him from the defendant, or from any parties on his behalf, during the eight years over which the particulars furnished by the plaintiff extended. In his particulars the plaintiff had not given credit for any money received, and the defendant wished to ascertain the amount of the sums paid, in order that he might pay the balance into court.

**PARKE B.**—All that we can do is, to make the plaintiff say, according to the practice, for what balance he goes. You are not to have a bill of discovery under the form of an order for particulars. How can we depart from the established practice?

**ALDERSON B.**—You are asking for a bill of discovery without the guards which a court of equity would impose.

**GURNEY B.** concurred.

**Rule refused.**



1836.

STRIDE, Assignee of the Duke of WELLINGTON, Constable of DOVER CASTLE, *against* HILL and two Others.

CHANNELL, on the part of the bail, two of the defendants, had obtained a rule nisi to stay proceedings on the bail-bond in this cause, they having rendered their principal, the other defendant.

Busby now showed cause, and took a preliminary objection to the affidavits, which were entitled in the action on the bail-bond. He submitted, that where there was no complaint of irregularity, the practice is, that the affidavit shall be entitled in the original action. [*Parke B.* Where the rule is not moved on the ground of irregularity, the affidavit may be entitled in either action (a).] Another objection is, that the present action is against the principal as well as the bail, yet the bail alone apply to the court, consequently the court cannot stay the action as against the original defendant, who ought to have joined with the other defendants, and have made an affidavit of merits.

PARKE B.—If proceedings are stayed against the bail, are you not at liberty to go on in the original action? If there is a stay of proceedings against two of the defendants, they must be stayed against all three. We must relieve the bail, and in doing so we incidentally relieve the principal. Here, the bail have complied with the rule of court, and we must stay the action upon the bail-bond against the principal, but you may proceed against him in the original action.

(a) See *Kelly v. Wrother*, 2 Chit. Rep. 109.

There must be the loss of an *intermediate* trial before the application to stay proceedings upon the bail-bond, to entitle the plaintiff to have the bond to stand as a security.

*Quære*, whether the gaol of the cinque port of *Dover* is a gaol to which a defendant may be rendered under the 1 W. 4. c. 70. s. 21.

Where bail apply to stay proceedings on the bail-bond, on the ground of having rendered their principal, and not on account of irregularity, the affidavit may be entitled either in the action on the bail-bond or in the original action.

Where in an action on a bail-bond against both the principal and the bail, the latter comply with the rule of court by rendering their principal, the court will stay the proceedings on the bail-bond, although the principal is no party to the application, and although he will be incidentally relieved by the stay of proceedings.

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*Busby.* At all events, the bail-bond must stand as security, the plaintiff having lost a trial. The defendant in the original action was arrested on the 21<sup>st</sup> December, and bail above was not put in, the time for doing which expired on the 28th; the plaintiff declared on the 29th, laying the venue in *London*, and on the 30th took an assignment of the bail-bond, on which proceedings were issued against both the principal and the bail. On the same day the defendant in the original action filed his bail-piece, and gave notice to justify at chambers on the 2d *January*. On the latter day the agents on both sides attended before *Coleridge J.*, when the bail were rejected. On Sunday the 3d the defendant was rendered to *Dover Castle*. On the 6th notice was given to the plaintiff's attorney of such render, and on the 7th an application was made to *Bolland B.* at chambers to stay proceedings upon the bail-bond, which that learned judge refused to do, being of opinion that the render to the gaol of the cinque port of *Dover* was not a good render within the 1 *W. 4. c. 70. s. 21*. On the 8th the plaintiff declared upon the bail-bond; on the 11th the defendant *Hill* was removed by *habeas corpus* into the *Fleet*, and on that day the present rule was obtained, drawn up to show cause on the 16th, which was the first day of the sittings during term in *London*. [*Parke B.* When do you say that you could have tried the cause?] At the second sittings, on the 29th.

*PARKE B.*—Then you have not lost a trial, for if the defendant had put in bail in due time you could not have tried before the 16th, on which day this rule was granted. There must be the loss of an *intermediate* trial before the time of the application to stay proceedings upon the bail-bond, to entitle the plaintiff to have it to stand as a security.

*BOLLAND B.*—Under the 1 *W. 4. c. 70. s. 21.*, the

defendant may be rendered in discharge of his bail, either to the prison of the court out of which the process has issued, or "to the common gaol of the county in which he was so arrested." The gaol at *Dover* is not within any county, and when I was applied to at chambers, it appeared to me that the legislature had omitted to provide for this particular case. I wish the court to give some opinion upon it.

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PARKE B.—That is a question requiring consideration. Looking at the clause, it would appear that the legislature intended to provide for all cases of render, and it strikes me that a defendant may be rendered either to a county gaol or to a gaol in the nature of a county gaol. However, I may be wrong, and it is not necessary to decide the point at present.

*Per Curiam*.—(PARKE, BOLLAND, ALDERSON, and GURNEY Bs.)

Rule absolute on payment of costs.

A doubt afterwards arose as to what costs were to be paid by the defendants, and *Busby* sought to have the costs of the attempt to justify bail included.

PARKE B.—The costs of justification will be costs in the cause. The costs, on payment of which the rule is absolute, are the costs of the assignment of the bail-bond, of the action upon the bond, and of the present application.

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HARDING *against* FORSHAW.

Under an order of reference of a cause, and all matters in difference between the parties, the costs of the suit and of the reference and award, and all other costs, were to abide the event, and final judgment was to be entered up for the plaintiff or the defendant according to the award. The arbitrator awarded that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay to the defendant a certain sum, which he found to be due from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from receiving the commission to which would be entitled under a certain agreement: Held, that the arbitrator had no power to direct in which way the verdict was to be entered, but only to decide whether the plaintiff had a right of action against the defendant;—and a rule to set aside the award was refused.

**T**HIS was an action to recover 244*l.* 17*s.* 6*d.*, claimed to be due from the defendant to the plaintiff, for commissions on the purchase and sale of lands effected by the plaintiff as the commission-agent of the defendant, and for money paid to the defendant's use. At the last summer assizes at *Liverpool*, the cause, and all matters in difference between the parties, were referred to arbitration under an order of *nisi prius*, whereby it was, among other things, ordered that “the costs of the suit, and of the reference and award, and all other costs, shall abide the event, as in the case of a trial at law; final judgment to be entered up for the plaintiff or the defendant, according to the award, for any damages or costs awarded to either of them, and execution to issue.” The arbitrator named in the order of reference made his award in the month of *December* in these following terms:—“First, I award and find that *John Harding*, the plaintiff, has no cause of action against *John Forshaw*, the defendant, but on the contrary: and I award that the plaintiff shall pay unto the defendant, on *Friday* the 18th day of *December* instant, at, &c., the sum of 36*l.* 13*s.* 4*d.*, which sum I award and find to be due and owing from the plaintiff to the defendant: and I declare that my award is not intended to exclude the said *John Harding* from the receipt of his commission on the land purchased from Mr. *Culshaw* at *Edge Hill*, which he will be entitled



receive according to the terms of an agreement marked B., and signed by the said *John Forshaw*."

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*Addison* now moved for a rule nisi to set aside the award. First, the arbitrator has not determined the cause: it is impossible for the court to say for whom the arbitrator intended the verdict should be entered. [*Parke B.* What was the issue?] It does not appear on the plaintiff's affidavit, but the action seems to have been in assumpsit. If the arbitrator meant that a verdict should be entered for the defendant, he should have said so in express terms. [*Alderson B.* He says that the plaintiff has no cause of action, and that the defendant is entitled to money from the plaintiff: is not that deciding for the defendant against the plaintiff?] He has not decided so that a verdict may be entered for the defendant, and costs taxed to him. In *Norris v. Daniel* (a), where the costs of the action and of an award were to abide the event of the award, and the arbitrators found that the plaintiff had a good cause of action on five out of eight counts, that the defendant should pay 5*l.* damages, and that no further proceedings should be had in the action; it was held that there was no award as to three counts, and no event to authorize the taxation of costs on those counts, and consequently that no part of the award could stand. [*Parke B.* That is not like the present case, for here the arbitrator decides that the plaintiff has no cause of action at all.] In *Leeming v. Fearnley* (b), where the costs were to abide the event, it was decided, that as the award did not show who was to pay them, it was not final. So, in *Grundy v. Wilson* (c), where the arbitrator found one issue for the defendant, and

(a) 10 Bing. 507. (b) 5 B. & Ad. 403. (c) 7 Taunt. 700.

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awarded the payment of rent due to him, but ordered no verdict or judgment to be entered; it was held that the defendant was not entitled to enter up judgment in the action for the rent, and the costs of the action which had been taxed to him. That was a strong case, for the merits of the cause had been disposed of by the arbitrator. Here, it was the intention of the parties that he should give a legal event to the cause, so that costs might be taxed. In all the cases that have been cited, it was inferred that the arbitrator had power to give such a legal event. The expression that the costs are to "abide the event as in case of a trial at law," shows that it was intended that he should direct which way the verdict was to be entered. From the affidavit issue must have been joined, and the arbitrator ought to have disposed of it.

PARKE B.—The arbitrator had no power to direct the way in which the verdict was to be entered; all he had to decide was, whether the plaintiff had a right of action, and then judgment was to be entered up according to his award.

*Addison.* At all events the award is not final, for the arbitrator declares that the award is not to preclude the plaintiff from receiving commission in respect of land purchased from a Mr. *Forshaw*, which he will be entitled to receive under a certain agreement. It can be shown by the affidavit of the plaintiff, that if he ever had a right of action as to that commission, he possessed it when the suit was commenced; if that will not be going too much into the merits.

PARKE B.—Much too far. That clause was introduced into the award from an excess of caution, for

*Talfourd* Serjt. now showed cause. The question is, whether the set-off prayed for by the rule is allowed, to the prejudice of the lien of the defendant's attorney for costs, and since the rule of court is *W. 4. r. 93.*, there is no doubt it cannot. In *C. Bettelley (a)*, where, upon a reference of two causes, damages in the first were ordered by the award, and set off against costs in the second, it was held that it could only be done subject to the lien of the attorney of the plaintiff in the first cause, for his costs. The authority goes further than it need be contented with, in behalf of the attorney in the present case.

*Ball contra.* The sum awarded to the plaintiff must be set off against the defendant's costs. [*Parke B.* They must be set off, subject to the lien of the defendant's attorney, unless they are in the nature of interlocutory costs.] The practice of the courts of King's Bench and Common Pleas are opposed to each other on this subject. [*Parke B.* We adopt the practice of the court of Common Pleas.] Although the defendant's attorney has made an affidavit, he does not swear that he should have done, that these costs are costs of the particular suit, which, according to the rule of court, they ought to be, in order to make them subject to the lien.

set off against the defendant's costs, subject to the costs of the attorney. The plaintiff, however, must pay the costs of the application, as he has asked too much.

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*Per Curiam*.—(Lord ABINGER C. B., PARKE, BOLTON, and ALDERSON Bs.)

Rule accordingly.


**WORRALL against GRAYSON.**

**ASSUMPSIT** for money paid, for interest, and on an account stated. Plea, that before and at the time of the commencement of this suit, and at the time the accruing of the cause of action in the declaration mentioned, to wit, on &c., the plaintiff and defendant used, exercised, and carried on the trades and businesses of millers, farmers, and smiths, in copartnership. And the defendant says, that the causes of action in the declaration mentioned, arose out of and from *transactions* between the plaintiff and defendant as such copartners: and that at the time of the commencement of this suit, the accounts of the said partnership were not settled, adjusted, or any balance struck by and between the plaintiff and defendant, and the same are still open and unadjusted. Verification. Demurrer, assigning for causes, that the plea is an argumentative denial of the promises alleged in the declaration, and amounts to the general issue of non-assumpsit: and also that the plea does not sufficiently confess and avoid the causes of action alleged in the declaration: and also that it does not appear with sufficient

Assumpsit for money paid to the defendant's use, and on an account stated. Plea, that at the time of the accruing of the cause of action, the plaintiff and defendant carried on business in copartnership, and that the causes of action arose out of *transactions* between them as such copartners; and that at the commencement of the suit, the accounts of the partnership were not settled or any balance struck. The plea was held bad on


special demurrer: because, first, it did not distinctly state that the money was paid in respect of a partnership transaction; secondly, if it did, it amounted to the general issue; and thirdly, as pleaded to the account stated, it also amounted to the general issue.

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certainty, from the plea, what the accounts mentioned in the plea were: and also, that it is not stated with sufficient certainty in the plea that the said debts and causes of action mentioned in the declaration formed any part of the said accounts, or were in any way connected therewith: and also, that the mere circumstance of the causes of action having arisen out of and from transactions between the plaintiff and defendant as copartners, may or may not be a bar to the maintaining an action on the causes of action mentioned in the declaration, according to the nature of the said supposed transactions: and also, that the averment, that the causes of action arose out of and from transactions between the plaintiff and defendant as copartners, is too vague, general, and uncertain: and also, that it is not stated or shown that the said transactions were of such a character as to bar the plaintiff from an action at law, or how the causes of action arose therefrom: and also, that it does not appear that the action was brought for any share of partnership profits, or for contribution towards partnership losses, or that the promises were made by the plaintiff jointly with defendant: and also, that no time is stated when the said transactions took place, or when the causes of action arose therefrom: and also, that the defendant ought to have stated what the said transactions were: and also, that the statement of an account between the plaintiff and defendant as copartners, and the finding of money to be due to the plaintiff from the defendant on such account, and the promises by the defendant, in consideration thereof, to pay the money so found to be due as in the declaration mentioned, is a transaction between the plaintiff and defendant as copartners, upon which a cause of action arises, and an action at law is maintainable; and yet, that the defendant has not sufficiently avoided the last-mentioned

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causes of action, as by expressly averring that the money so found to be due, was, by mutual agreement between the plaintiff and defendant, after the stating of the said account, mixed up with the partnership accounts or otherwise: and also, that it can only be gathered by inference from the said plea, and is not stated with sufficient positiveness, that the said money so found to be due was mixed up with or formed any part of the partnership accounts: and also, that it is only to be gathered by inference, and is not stated with sufficient positiveness, that there were any items in the said partnership accounts, of a date subsequent to the finding of the said money to be due, and the promise to pay the same: and also, that the plea being bad in part, viz. being bad as to the count on the account stated, is bad altogether: and also, that it is not stated in the plea, which cause of action the defendant intends to refer to, at the time of the accruing of which he states that the plaintiff and defendant used, exercised, and carried on the said trades and businesses in copartnership: and also, that the plaintiff cannot safely tender an issue upon the plea: and also, that whichever cause of action the defendant intends, he ought not in his plea to have stated that the same accrued on a day different from that mentioned in the declaration: and also, that it ought to have been stated, that the plaintiff and defendant were copartners at the time when all the causes of action accrued. Joinder in demurrer.

*Addison*, in support of the demurrer, was stopped by the court, who called upon

*Petersdorf* to sustain the plea, who submitted, with respect to the first ground of demurrer, that the de-

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EDWARDS *against* CHAPMAN.

**A**SSUMPSIT to recover 200*l.* for goods sold and delivered, money paid, and on an account stated.

**Pleas :** general issue, except as to 180*l.* 12*s.* Secondly, as to the price and value of 850 pair of trimmings, parcel of the said goods in the said declaration mentioned, to wit, the sum of 180*l.* 12*s.* parcel &c., the defendant says that the plaintiff ought to maintain his aforesaid action thereof against him, because he says that the said goods, parcel &c., were sold and delivered by the plaintiff to the defendant in pursuance of a certain contract before then made between the plaintiff and the defendant, and that afterwards and before the commencement of this suit, to wit, on &c., it was agreed between the plaintiff and the defendant that the said contract should be wholly rescinded and annulled, and the same was then wholly rescinded and annulled accordingly. Verification. General demurrer, and joinder.

The point intended to be argued on the part of the plaintiff was stated in the margin of the demurrer-book to be:—that no written contract being mentioned in the declaration, the rescinding of it is no defence.

*Cowling* in support of the demurrer, cited *Planchè v. Colburn* (a). [*Parke* B. We cannot tell that this contract was for more goods than were delivered. The defendant pleads that the contract is rescinded; that is a release by parol, which cannot be.] The court then called upon

*Richards* to support the plea. It is admitted by the demurrer that this particular contract of sale was

Assumpsit for goods sold and delivered.

Plea, as to parcel of the goods mentioned in the declaration, that they were sold and delivered by the plaintiff to the defendant, in pursuance of a contract before then made between them; and that afterwards, and before the commencement of the suit, it was agreed between the plaintiff and defendant, that the said contract should be wholly rescinded, and the same was rescinded accordingly. On demurrer, the plea was held bad, on the ground that the duty arising under the contract of sale by the delivery of the goods, could only be got rid of either by a release or by an accord and satisfaction.

(a) 1 Moo. & Sc. 51.

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rescinded, and that being so, no action maintained upon such contract.

PARKE B.—You may rescind an execution but here a duty has arisen under the contract by the delivery of the goods, which must be satisfied either by release or by accord and satisfaction.

*Per Curiam.*—(Lord ABINGER C. B., Lord LAND, and GURNEY Bs.)

Judgment for the plaintiff.

### THOMPSON *against* CLUBLEY

An agreement made contemporaneously with the accepting a bill for the accommodation of the indorsee, that if outstanding when due, it should be taken up and paid by him, and that no demand should ever be made in respect of it, on the drawer or acceptor, is a good defence in an action by the indorsee against the acceptor; for it is an agreement merely collateral to the bill, not varying its terms or rendering less liable to a claim by any third person being a *boná fide* holder for value.

**A**SSUMPSIT by indorsee against acceptor of exchange for 200*l.* drawn by *Raines* to his order, and indorsed by him to the plaintiff. Plea: that the said bill of exchange was accepted by *Raines* at the request, and for and to the accommodation of and for the plaintiff, and indorsed by the defendant at the request of *Raines* to the plaintiff's accommodation; and at the time of the drawing and accepting of the bill it was agreed between the said parties, that if the said bill should be outstanding at the time when it became due, it should be taken up and paid by the said plaintiff, and no claim or demand should at any time be made by the defendant or *Raines* upon or in respect of the said bill.

(a) See *Adams v. Wordley*, *infra*, Easter term, 1836.



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Replication, that at the time of the commencement of the suit, the plaintiff was a holder of the bill for good and sufficient consideration, with a traverse of the allegation, that it was made and accepted for his accommodation, and also of the agreement alleged in the plea.

At the trial at the *London* sittings after last term, before Lord *Abinger* C. B., *Raines* the drawer was called for the defendant (a), and swore, that having occasion to raise money in 1833, he applied to an attorney, who settled with the plaintiff that *Raines* should give him the bill now sued on, upon the terms that it should be taken up by the plaintiff when due, without suing the defendant, the acceptor, and that the defendant should accept and provide for two bills for 100*l.* each, drawn on him by the plaintiff. The plaintiff had taken up one of these bills, and the defendant had not received value for his acceptance of the other. The plaintiff's counsel objected to the reception of this evidence, as tending to contradict that written engagement of the defendant to pay the bill, which appeared upon the face of it; *Foster v. Jolly* (b). That objection having been overruled, it was contended for the plaintiff, that the exchange of paper between *Raines*, the drawer, and the plaintiff, the indorsee, who was liable to provide for the plaintiff's bills, was a sufficient consideration to support the present action against the acceptor; but Lord *Abinger* being of opinion on the evidence that the bill was taken by the plaintiff on his special contract not to sue defendant upon it, and that the plea was made out, the plaintiff's counsel elected to be nonsuited, having obtained leave to enter a verdict for the amount of the bill, if the nonsuit was wrong.

(a) See Bayley on Bills, 4th ed. 419.

(b) 5 Tyr. R. 239.

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*J. Henderson* moved accordingly. The drawer received bills for 200*l.* from the plaintiff in exchange for the bill sued on, so that there was consideration between them; and it is alleged in the plea there was no value between the drawer and the defendant, the acceptor. If the drawer has had the benefit of it, he has the acceptor in fact. The parol agreement between the plaintiff only was to provide for the bill was inadmissible, being contrary to the terms of that written instrument.

LORD ABINGER C. B.—The undertaking relied on by the defendant was collateral to the note. At trial the plaintiff relied on the defendant's inability to make a bill of exchange a different contract from that which it purported to be without matter in writing. Now it is one proposition that a written contract cannot be varied by a parol one; but it is quite another question whether a man may not, by a collateral contract, bind himself not to enforce his remedy on a previous one. Besides, the defendant would have been obliged to take up his own acceptance had it been in the hands of a third person, who was a *bonâ fide* holder for value.

PARKE B.—The drawer stated in his evidence that the agreement not to sue the acceptor was cotemporaneous with the drawing of the bill. Then might not it be proved for the defendant that the drawer put his name on the bill to accommodate the plaintiff, and to enable him to use that bill in the market? If the agreement was between the original parties, at the time of drawing and accepting the bill, was, that as between them it was not to be paid, the defendant's acceptance would still be the plaintiff's accommodation. The plaintiff took, and the defendant accepted the bill, with the full knowledge and on a clear understanding that the act of each

them in so doing was for the plaintiff's accommodation; why is not that legal? The agreement that the plaintiff only should pay the bill was not more contrary to its terms than every accommodation bill is. It shows that there never was any value between the plaintiff and defendant, in respect of which the latter could be called on to pay the bill to the plaintiff, though it would be otherwise if he had been called on to pay it when in the hands of a third person for value. The acceptor of a bill may equally show that he never received value for it, whether he is sued as indorsee or by the drawer.

The other Barons concurred.

Rule refused.

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MARSHALL *against* WHITESIDE and ELEANOR VICTORINE his Wife.

COVENANT. The declaration stated, that heretofore and whilst the defendant *E. V.* was sole and unmarried, to wit, on &c., by indenture then made between the plaintiff of the one part, and one *A. G.* and the defendant *E. V.* by her then christian and surname of *E. V. G.* of the other part, the plaintiff, for the consideration therein mentioned, did demise and lease unto the said *A. G.* and the defendant *E. V.*, their executors, administrators, and assigns, certain premises with the appurtenances from the 25th March

In an action of covenant against *C.* and *B.* his wife on an indenture of lease, the breach alleged was, that *A. & B.* (the lessees) did not whilst the defendant *B.* was unmarried, nor did *A.* and the defendants after their intermarriage, within every

third year of the first seven years of the term, paint, &c. To this breach the defendants pleaded that *A. and the defendants* did, within every third year, during the first seven years of the said term, paint, &c. On demurrer, assigning for cause that the plea proffered a different and larger issue than that tendered by the declaration, the plea was held bad.

A defendant may pay money generally into court upon several breaches or counts, and plead such payment in the form given by the rule of court of *H. T. 4 W. 4, r. 17*, without specifying how much is paid in respect of each breach or count.

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then next, for and during the term of 21 years from thence next ensuing, determinable nevertheless as is hereinafter mentioned. The declaration then set out covenants by the lessees, jointly and severally, to paint the premises inside and outside in every third and seventh year of the term, and to repair the premises, and to deliver them up in a state of repair at the end or other sooner determination of the term. The breaches denied performance of the covenants in the terms of them as follows :—

That the said *A. G.* and the defendant *E. V.* did not nor would, whilst the defendant *E. V.* was sole and unmarried, nor did nor would the said *A. G.* and the defendants after the intermarriage of the defendants, at their costs and expenses, within every third year during the continuance of the first seven years of the said term by the said indenture granted, paint or cause to be painted the whole outside wood and iron work of the said messuage or tenements and premises, and all the fences and appurtenances thereof, with two coats of paint well mixed in oil, in a good and workmanlike manner, nor did nor would they the said *A. G.*, &c., within every third year during the continuance of the first seven years of the said term by the said indenture granted, in like manner paint or otherwise colour the whole of the said outside stucco work of the said messuage of a uniform stone colour, nor did nor would the said *A. G.* in like manner paint or cause to be painted, according to the tenor, &c. of the said covenant, with two coats of paint in oil, all such parts of the inside of the said messuage or dwelling-house and premises as had been heretofore painted, or as from repairs, alterations or improvements thereof or thereunto did need painting, but on the contrary thereof wholly neglected and refused so to do. That the said *A. G.*, &c. did not nor would from time to

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time &c., during the continuance of the first seven years of the said term by the said indenture granted, at their own like costs and expenses, well and sufficiently and substantially repair, &c. the said demised messuage or dwelling-house and premises, and also the subterranean road or passage leading from the front of the said demised premises to the sea beach, and all walls, vaults, &c., and other appurtenances belonging or to belong thereto, or used or to be used therewith, in such and substantial manner as was necessary and convenient for the occupation of a tenant at rack rent: nor did nor would they the said *A. G.* and the defendants, at the end and determination as aforesaid of the said term by the said indenture granted, peaceably and quietly leave, surrender, and yield up to the said plaintiff the said messuage or dwelling-house and premises, with the appurtenances, so well, sufficiently, and substantially repaired, &c. at the expiration of the said term so determined at the end of the first seven years as hereinbefore mentioned, together with all marble and other chimney pieces, &c. and all other fixtures and things whatsoever, which, at the commencement of the said term, or at any time during the continuance thereof, had been affixed or fastened thereto, according to the form and effect of the said indenture in that behalf made as aforesaid; but on the contrary thereof, they the said *A. G.* and the defendant *E. V.*, whilst she was sole and unmarried, and the said *A. G.* and the defendants since their intermarriage, wholly neglected and refused so to do, and the said *A. G.* and the defendants, after the intermarriage of the defendants at the determination of the said term, left the same premises so out of repair and in such bad order and condition as aforesaid, contrary to the tenor, &c.

Plea to the first breach: that the said *A. G.* and the defendants did, at their costs and expenses, within every

withstanding manner, according to the true intent and meaning of the said indenture.

There were similar pleas of performance and third breaches.

Fourth plea.—And as to the alleged breach of covenant fourthly and lastly above assigned the defendants say, that the plaintiff ought not to maintain her action in that behalf, because the plaintiff brings into court the sum of ninety pounds to be paid to the said plaintiff; and the defendants say, that the plaintiff has not sustained her loss to a greater amount than the said sum of ninety pounds in respect of the said breaches of covenant fourthly and lastly above assigned. Verification.

Special demurrer to the first plea, assigning that the plaintiff in her said declaration alleges that the said *A. G.* and the defendant *E. V.* did not perform the said covenant, but the defendants say, that whilst she the said *E. V.* was sole and unmarried, and did not and would not marry the said *A. G.* and the defendant *E. V.*, their intermarriage, perform the said covenant, but the defendants do not deny the non-performance of the said contract, but say that the said *A. G.* and the defendant *E. V.*, whilst the said *E. V.* was sole and unmarried, but in their said declaration allege, that the said *A. G.* and the defendant *E. V.* performed the said covenant, which is a different and larger issue than that tendered by the plaintiff.

not to have been taken by the defendants; and that although the defendants by their said plea profess to answer the whole of the breach of covenant by the plaintiff first above assigned; yet the said plea in fact only answers a part thereof, namely, the breach of covenant committed by the said *A. G.* and the defendants after the intermarriage of the defendants, but leaves wholly unanswered the breach of the said covenant in the declaration alleged to have been committed by the said *A. G.* and the defendant *E. V.* before her intermarriage with the defendant *William Whiteside*. And also that the defendants have not in and by their said plea denied or confessed and avoided such breach of covenant in the declaration first above assigned.

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There was a similar demurrer to the second and third pleas.

Demurrer to the fourth plea, assigning for causes, that the defendants should have stated and shown in and by their said plea, how much and what part of the said sum of ninety pounds, which the defendants bring into court, is intended to be brought into court and paid on account of the damages sustained by the plaintiff by reason of the breaches of covenant by the plaintiff fourthly above assigned, and how much and which part of the said sum of ninety pounds to the said breaches of covenant by the plaintiff lastly above assigned. But by the defendants bringing the said money into court and paying same in respect of the whole of the breaches of covenant by the plaintiff fourthly and lastly above assigned, said plaintiff cannot safely reply to the said plea, or take issue thereon.

*Ogle* in support of the demurrers. The first plea renders too large an issue, for it is not in the words of the breach, neither is it co-extensive with the issue thereby tendered; and there is the same objection to the second and third pleas.

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**PARKE B.**—Your objection is, that there is no complete affirmative and negative. The first plea is not a plea of denial; it should have been a denial in substance and in form. The plaintiff, however, might safely have taken issue upon it.

**LORD ABINGER C. B.**—Are the defendants willing to amend?

*Crowder.* They are willing to amend the first three pleas, but not the fourth, which is a plea of payment of money on two breaches, and is in the form given by the new rule of pleading of *Hilary* term, 4 *Will. 4. r. 13*. [*Parke B.* It does not say how much is paid on either breach. It used to be the practice to pay money into court on several counts, without saying how much was paid on each count; and in *Jourdaine v. Johnson* (a) this court said, that they saw no reason why this might not be equally done under the new rule. If any practical inconvenience is found to attend the payment of money into court generally without apportioning it, then such apportionment must be made a condition by the judge at chambers, for money cannot be paid into court, in a case like the present, without a judge's order. *Lord Abinger C. B.* We understand the objection to be, that the money is paid into court without being specifically appropriated to either breach, and the answer is, that such appropriation is not necessary; for it is competent to the plaintiff, upon the issue, to prove that he has sustained damages exceeding the sum of 90*l.*]

*Ogle.* This plea should have specified how much of the sum brought into court was paid in respect of each breach. In a recent case in the Court of King's

(a) 5 Tyr. 532.



h (a), where payment was pleaded, without saying much was paid on one count and how much on another, the plea was held bad, and one of the judges said that the plea of tender could be supported only on long established practice. Until the recent statute, *Will. 4. c. 42. s. 21.*, money could only be paid out in respect of unliquidated damages, and if a defendant is allowed to pay a certain sum upon a number of issues, it will impose a hardship on the plaintiff. [Lord Abinger C. B. What hardship is it to the plaintiff? It would be a hard case for a defendant if he were obliged to pay in a certain sum on each count, for the plaintiff might recover more upon some count than the sum so paid. *Parke B.* Was it the constant practice, before the plea of payment was introduced, to pay money generally into court, without saying how much was paid in respect of each count? Why should you not make the practice conform to that plea accord with the old practice? In *Maline v. Johnson* this court gave an opinion, that a payment into court, without appropriating it to the amount demanded of the plaintiff, was good. Mr. Justice Patteson has expressed to me his dissatisfaction with the judgment of the King's Bench in *Mee v. Tomlinson*, so far as it related to the plea of payment, and thinks that the plea of tender as pleaded in the former case is right.] By the rules of *H. T. 4 Will. 4. r.* a plaintiff is to be at liberty to take the money out of court and tax his costs which it is intended by the rule that he should have; but if a defendant may pay money generally into court upon twelve issues, he will be deprived of the benefit which the rule meant to give him, for eleven issues may be found for him and against him, and the defendant would be entitled to judgment and to costs. [Lord Abinger C. B. If a

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(a) *Mee v. Tomlinson*, K. B. Mich. Term, 1835.

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plaintiff finds that a defendant has paid too little into court upon the whole, he may go to trial on the issue so raised, and if he proves that too little has been paid he will recover more. *Parke B.* Direct your attention to those cases in which money may be paid into court without a judge's order. In the present case there must be an order, and if any inconvenience is found to result, the order may require the money to be paid in separate breaches or counts. Can you show that any inconvenience would arise from allowing money to be paid generally into court under the new plea, that did not result from paying it in under the old practice? ] Here the evidence rests with the defendants; they may say that they painted within three or seven years, as the case may be, and they may refuse admission to the plaintiff's surveyor. This is a different case from one in which a plaintiff has the case within his own knowledge, for the plaintiff may be unable to contend with the evidence advanced on the other side. [*Parke B.* Look at the inconvenience, on the other hand, to the defendant; if he should make a slip on one breach the plaintiff would recover, although the defendant has paid in 20*l.* too much upon the other breach. If the defendant was bound to pay money into court on each breach, he would pay more than was requisite in order to be safe. *Prima facie*, the balance of inconvenience is against a defendant, and any inconvenience to a plaintiff may be remedied in the judge's order. Show me some inconvenience that would result in a case where it is not necessary to have a judge's order.] The new rules of pleading were intended to benefit plaintiffs by disclosing the real issue, and dispensing with unnecessary evidence; but if there are five or six issues on a record and a defendant is permitted to pay money general into court upon the whole, the plaintiff will reap no advantage from those rules, for he must go to trial on

pared to support all his breaches. Where, as in the present case, two breaches are alleged of a covenant to repair and to leave in repair; the plaintiff has a right to call upon the defendant to say how much he pays into court on each breach.

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PARKE B.—This plea only obliges the plaintiff to prove that the money paid into court is not a fair compensation on both the breaches—if it is she ought to take it. I cannot see at present that she is put to any inconvenience.

Ogle applied to amend.

Crowder, for the defendant, objected.

*Per Curiam*—(Lord ABINGER C. B. PARKE, BOLAND, and GURNEY Bs.)—Both parties must be allowed to amend, without payment of costs by either.

*The KING against The SHERIFF of MIDDLESEX, in a cause of HAMMOND against BEAN.*

THE defendant had been arrested under a *capias*, on the 29th *December*, when he gave a bail-bond to the sheriff. On the 2nd *January* the sheriff was ruled to return the writ; to which he returned *cepi corpus*, and on the 8th a judge's order was obtained to bring in the body. On the 14th such order was made a rule of court, and on that day an attachment was issued against the sheriff for not bringing in the body.


It is not necessary for bail to justify before they render their principal.

And where the bail, without justifying, rendered their principal after the expiration of the body rule, the court

set aside an attachment against the sheriff on payment of costs.

*J. Bayley* now showed cause. The question in this case is, whether the render is good, and it is said that it is not; for when once the body rule has expired, there can be no render unless the bail have justified. This point was decided by Mr. Justice *Littleton* in the Bail Court, in *Stamford v. Barry*, Hil. Term, 1806, which case was mentioned again to Mr. Justice *Bayley*, and was afterwards brought before the court; but both that learned judge and the other refused to interfere with the decision, as did Mr. Justice *Coleridge*, to whom it was subsequently brought. [*Parke B.* Was that a rule to set aside the judgment on payment of costs?] Yes, it was a similar rule to the present, except that there the render was made to the attachment, and here the attachment is made to the render, which makes this the stronger case. The plaintiff has no power to keep the defendant in custody, and the moment this rule is disposed of he must be released, as the render is not good. [*Parke B.* Was it necessary for the bail to justify in order to make the render good? They might have rendered the defendant principal immediately after justification; and on that point it appears the same thing, if instead of justifying they rendered the defendant. What authority have you for saying the render is not good? I never heard of it.]

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*J. Jervis contra.* In *Stamford v. Barry*, Mr. Justice *Littledale* thought, that by the rule of court of T. T. §3 G. 3. (a), the bail must justify before they render. [*Parke* B. That is to make the attachment irregular. Here the bail are just in the same situation as though they had justified first and rendered afterwards. *Bolland* B. Have you seen *The King v. The Sheriff of Middlesex*? (b)]

*Bayley.* *Stamford v. Barry* is directly opposed to that decision. [*Parke* B. There must have been some mistake as to the facts in the former case.]

LORD ABINGER C. B.—The authority of Mr. Justice *Littledale*, in *Stamford v. Barry*, was not confirmed by the Court of King's Bench, for they merely refused to review the decision of that learned judge; and as we have been furnished with the ground of that decision, which we think does not support the ruling, we have the less difficulty in saying that it appears to rest on no just foundation. This rule must, therefore, be made absolute.

PARKE, BOLLAND, and GURNEY Bs. concurred.

Rule absolute on payment of costs.

(a) See 5 T. R. 368.

(b) 7 T. R. 527.



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HALL and Others, Executors, *against* CHAMPNE  
Baronet.


The defendant was arrested on the 26th October, and deposited the amount of the debt and 10*l.* for costs, with the sheriff in lieu of bail, under the 43 G. 3. c. 46. s. 2. On the 10th November the sheriff was ruled to return the writ, and on the 17th his agent filed a return, stating the arrest and deposit of the money, and that it had been paid into court. Owing to an inadvertence in sending up the writ without the money it had not been so paid, and in consequence

IN this case the defendant had been arrested by the sheriff of *Carnarvonshire* on the 26th October, and had deposited in the hands of the sheriff 94*l.* 7*s.* the amount of the debt, and 10*l.* for costs, pursuant to the 43 G. 3. c. 46. s. 2. On the 10th November the sheriff was ruled to return the writ, and on the 16th he forwarded the writ to his agent in *London* who did not remit the money with it. On the same day his agent wrote desiring the money to be sent up immediately, and on the 17th, in order to avoid an argument, he filed a return to the writ, which after stating the arrest and the depositing of the money, alleged that the sheriff had paid it into court pursuant to the statute. The agent, in his affidavit, swore that he made such return with the intention of paying the money into court as soon as he received it, but owing to the under-sheriff of the said county being from home he had no reply to his letter of the 16th until the 23rd. On the 23rd the plaintiffs commenced an action against the sheriff for a false return. On the 30th a sum of 10*l.* was taken out on behalf of the sheriff to show

of the absence of the under-sheriff from home, it was not paid in previous time, on which day the plaintiffs commenced an action against the sheriff for a false return. The sheriff having obtained a rule nisi why he should not be at liberty to pay the money into court, and why it should not remain in court as though it had been paid in due time, the court made the rule absolute on payment of costs.

On the 20th November a judge's order had been obtained on the part of the defendant in the following terms: "I do order that the defendant shall be at liberty to come into court the sum of 10*l.*, making, with the sum of 94*l.* 7*s.* 1*d.* and 10*l.* for costs deposited with the sheriff of *Carnarvon* in lieu of bail upon the writ, and received by him as paid into court, the amount required to be deposited by the statute the 7 & 8 G. 4. c. 71. s. 2., to abide the event of the suit in lieu of perfecting the writ. And I do further order that the said defendant enter a common appearance with." On the same day the defendant paid 10*l.* into court, and entered a common appearance; but the money deposited with the sheriff was not paid into court. On the 16th January the defendant demanded a declaration. Held, that the plaintiffs were not obliged to proceed until they obtained what was equivalent to bail, and the court set aside the demand of declaration with costs.

before *Alderson* B. at chambers, why, on payment of the sum of 104*l.* 7*s.* into court in the above cause, all further proceedings in the action against the sheriff should not be stayed, but that learned judge refused to make any order. In the meantime the following order in the cause had been made by Mr. Baron *Parke*.

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“ I do order that the defendant shall be at liberty, within one day, to pay into court the sum of 10*l.*, making, with the sum of 94*l.* 7*s.* 1*d.* and 10*l.* for costs deposited with the sheriff of the county of *Carnarvon*, in lieu of bail upon the writ, and returned by him as paid into court, the amount required to be deposited by the statute of the 7 & 8 *G.* 4. c. 71. s. 1., to abide the event of the suit, in lieu of perfecting bail. And I do further order, that the said defendant enter a common appearance forthwith. Dated 20th November 1835.  
 J. PARKE.”

In the course of the same day the defendant paid 10*l.* into court, and entered a common appearance.

*Cooling* having obtained a rule *nisi* why the sheriff should not be at liberty to pay into court the said sum of 104*l.* 7*s.* 1*d.* so deposited with him on the arrest of the defendant, and why the money should not remain in court as though it had been paid in due time,

*Watson* now showed cause. If the sheriff had paid the money into court in due time, the plaintiffs would have been entitled to have had it paid over to them under the 43 *G.* 3. c. 46. s. 2., in consequence of special bail not having been perfected, no deposit having been paid into court, pursuant to the 7 & 8 *G.* 4. c. 71. s. 2. Also by the sheriff's neglect the plaintiffs have been delayed in the present action, for the common appear-

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ance entered for the defendant was conditional on the payment of the money into court. [*Parke B.* You have brought an action against the sheriff, and his object in paying the money into court is to prove such payment at the trial in mitigation of damages. Are you willing to receive the money and put an end to the action against the sheriff?] The plaintiffs are entitled to the money, under the 43 G. 3. c. 46. [*Parke B.* At present the question is between the sheriff and the plaintiffs; to obtain the money there must be a separate application, to which the defendant must be made a party.] Where a sheriff asks relief it is generally on the ground of mistake, but no such excuse can be alleged here.

**PARKE B.**—This rule must be made absolute on payment of the costs of the application. If the money is paid into court, and the plaintiffs will consent to waive their action against the sheriff, then they must have the costs of that action also.

*Per Curiam.*—(PARKE, BOLLAND, ALDERSON, and GURNEY Bs.)

Rule absolute to pay the money into court on payment of costs.

*Watson* had obtained a rule to show cause why the demand of declaration served in this cause (on the 16th *January*) should not be set aside with costs, on the ground that the order of Mr. Baron *Parke*, to enter a common appearance, was conditional, on payment into court of the money in the hands of the sheriff (a).

(a) This rule was moved previous to the disposal of the above rule.



*handless* now showed cause. By the 43 G. 3. s. 2. a defendant on being arrested may deposit amount of the debt, and 10*l.* for costs, in the hands of the sheriff in lieu of bail; and on such money being paid into court a defendant is entitled to enter an appearance. The present case is the same as if the money had been so paid, for the plaintiffs consented to an order that the defendant might enter an appearance. Such appearance was accordingly entered, and thereupon the defendant was in court and entitled to demand a declaration. [*Parke* B. The defendant was not in court until the sheriff had paid the money. By the order the defendant was to deposit 10*l.* in addition to the money to be brought into court by the sheriff; and to entitle the defendant to proceed, he must have got the sheriff to pay in such money.] By the order the plaintiffs consented to the defendant entering an appearance, which being done, the defendant was in court, and all the usual consequences followed.

*LORD ABINGER* C. B.—The plaintiffs may have consented to an appearance being entered for their own advantage, in order to give them an opportunity of proceeding on with the action if they pleased. This rule should be made absolute.

*PARKE* B.—The question is, as to the meaning of the order. It may be said that the defendant must have known the sheriff had not paid the money, and therefore it is not implied by the order that the sheriff was to pay the money into court. But what was to be the situation of the plaintiffs? Were they to be obliged to sit on in the meantime until the money was paid into court? It never could have been intended that

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the plaintiffs were to proceed before they obtained what was equivalent to special bail.

BOLLAND and GURNEY Bs. concurred.

Rule absolute, with costs.

NUNN *against* CURTIS, the younger.

The plaintiff having appeared for the defendant under the statute, and afterwards gone on to final judgment, a rule to set aside such appearance and all subsequent proceedings, for irregularity, on the ground that the defendant was a minor, was made absolute without costs to either party.

On showing cause against the rule it appeared that the application was by the father of the defendant, and that the latter

CAREY had obtained a rule to show cause why his appearance in this action, and all subsequent proceedings thereon, should not be set aside for irregularity, or why the judgment and all subsequent proceedings thereon should not be set aside upon payment of costs. The writ of summons was issued on the 16th November, and the defendant not having appeared, the plaintiff, on the 28th, entered an appearance for him under the statute, and on the same day declared. On the 8th December the plaintiff signed interlocutory judgment for want of a plea; and on the 15th issued a writ of inquiry, which was executed, and was returned on the 31st. On the 9th January the plaintiff signed final judgment. The ground on which Carey sought to set aside the proceedings was, that the defendant was a minor, and the plaintiff could not regularly enter an appearance for him; citing *Beven v. Cheshire* (a) and *Roberts v. Spurr* (b).

(a) 3 Dowl. P. C. 70.

(b) 3 Dowl. P. C. 551.

was not privy to it. The court held that there ought to have been an affidavit that the application was at the desire of the defendant, but adjourned the case in order that such an affidavit might be produced.

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*Kelly* showed cause, and took an objection that the defendant himself had not come to the court. This is not an application by the defendant but by his father; it is supported by the affidavits of the father and of an attorney, who cannot appear for the defendant, as an infant may not have an attorney. An infant may appear in person to an action, and it is apprehended that the defendant should have come personally before the court in some form or another in the present case. [Lord *Abinger* C. B. In applications of this kind the court are not so strict as in actions. Here if the defendant is an infant he may bring a writ of error.] An infant can only appear in two ways, either in person or by his guardian regularly assigned. [Lord *Abinger* C. B. You are speaking of the appearance of parties on process issued in some suit; this is a different appearance from that.] At any rate it should be shown that the defendant is privy to the application. It may be very proper that a father should have authority over his child, but not that he may appear for him in court. Here, after the plaintiff has taken regular proceedings to judgment, the father steps in, and from his affidavit it would seem that he makes this application without his son's sanction or knowledge. Any friend of the infant might just as well come to the court without his privy and raise some question as to irregularity. [Bolland B. Does it appear from the father's affidavit that he comes here on behalf of the infant?]

*Carey*.—No :—but there have been communications between him and the plaintiff as to this action. The plaintiff, after signing final judgment, applied to the father for payment, and he ought now to be allowed to object to the latter being heard.

BOLLAND B.—It is a question whether we should

On a subsequent day an affidavit was produced from which it appeared that the application had been made without the knowledge of the defendant, who now had his approbation, which was held sufficient.

*Kelly.* Supposing these proceedings to be irregular, the defendant should have come to the court at an earlier period, and not have allowed the plaintiff to go to final judgment, for he had notice of the proceedings. The plaintiff subsequently showed him indulgence by not issuing execution upon the judgment. The court therefore, ought not now to listen to the application, where a person complains of irregularity he should do so promptly. [*Parke B.* This is not an irregularity that can be cured.]

**LORD ABINGER C. B.**—The court would have granted the rule absolute the other day if it had then appeared that the infant was a party to the application.

**PARKE B.**—If we were to refuse this application the defendant might bring a writ of error, and your proceedings would be set aside from the beginning. What we ought now, in strictness, to do, is to set aside, and allow the defendant to appear by guardian.

PARKE B.—We will not make your client pay costs, for they could not have been obtained upon a writ of error.

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Rule absolute, without costs on either side, the defendant to be at liberty to appear by guardian.

### WILLIS *against* DARKE.

**T**HIS was an action to recover the sum of 21*l.* 1*s.*, for officers' fees, sheriffs' poundage, and possession money. The declaration was delivered on the 10th *November*, and the time to plead had been extended, under several judges' orders, until the 2d *December*. On that day the defendant took out a summons for staying the proceedings on payment of 12*l.* 12*s.* 6*d.*, which was attended before Mr. Baron *Bolland* at chambers on the 4th, when the plaintiff having refused to accept the above sum, alleging that more was due, that learned judge made an order that the defendant should be at liberty to pay that sum into court, and if the plaintiff should recover no more the

In an action brought to recover 21*l.* 1*s.* the defendant took out a summons to stay proceedings on the payment of 12*l.* 12*s.* 6*d.* into court. The plaintiff having refused to accept that sum, the judge before whom the summons was heard, made an order that the defendant should be at liberty to

pay the money into court, and if the plaintiff should recover no more that the defendant should not be liable to costs from that time. The defendant afterwards offered to pay 15*l.* and costs, in order to settle the action. The plaintiff subsequently signed judgment twice for want of a plea; both of which judgments were set aside for irregularity. The defendant having pleaded the payment of the money into court, the plaintiff the next day took the money out, and gave notice to tax his costs, and two days afterwards delivered a replication, whereby he accepted of the money paid into court in full satisfaction of his debt. The defendant having obtained a rule nisi why the defendant's costs, subsequent to the summons to pay the money into court, should not be allowed and set off against the costs of the plaintiff; the court, on cause being shown, did not lay down any general rule of practice, but, under the particular circumstances of the case, discharged the rule in question.

Per *Parke B.*—It is *prima facie* vexatious in a party to refuse money paid into court, and afterwards to take it out, and he ought to be made to pay all the subsequent costs, unless he shows good cause of exemption.

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defendant should not be liable to pay any costs after that date. By the order the defendant had further time given to him to plead until the following day. After the order was made the clerk of the plaintiff's attorney told the clerk of the defendant's attorney that he was authorized to offer 15*l.* and costs in order to settle the action. On the 5th a summons for further time to plead was taken out, and on the 8th an order was made by Mr. Baron *Parke*, allowing the defendant another week for that purpose. On the 17th the plaintiff's attorney signed judgment for want of a plea, and gave notice to tax his costs. A summons was on that day taken out to set aside the judgment for irregularity, which was heard before Mr. Baron *Bolland* on the 19th, who ordered the judgment to be set aside with a stay of proceedings in the meantime. On the 24th the plaintiff, without having struck out the former judgment, signed a second judgment, and on the 29th gave notice to tax his costs on the 6th of *January*. Upon the latter day the defendant's attorney took out a summons to set aside the second judgment for irregularity, which was attended on the 11th before Mr. Baron *Alderson*, who ordered such judgment to be set aside, but without costs, and directed that the plaintiff should strike out both judgments; the defendant to have twenty-four hours to plead after notice thereof in writing. On the same day both judgments were struck out and notice given. On the 12th the defendant paid 12*l.* 12*s.* 6*d.* into court, and delivered a plea. On the 13th the plaintiff took the money out of court and gave notice to tax his costs; and on the 15th he delivered a replication, stating that he accepted of the sum taken out of court in full satisfaction of his debt. The defendant thereupon took out a summons to obtain his costs incurred since the 4th *December*, which was heard before Mr. Baron *Alderson*, when that learned

judge said a strong case of vexation ought to be made out to support the application, and he adjourned the case in order to give the defendant's attorney time to prepare an affidavit showing vexatious conduct on the part of the plaintiff. The learned baron subsequently refused to make the order, being of opinion that a case of vexation had not been established, but he left the defendant, if he thought proper, to apply to the court. On the 26th *January* both parties attended the taxation of costs, when the defendant sought to have his costs taxed and set off against the plaintiff's, but the master stated that he could not do so without an order of court. *J. Jervis* having obtained a rule *nisi* why the defendant's costs subsequent to the summons in the cause dated the 2nd *December*, should not be allowed and set-off against the costs of the plaintiff,

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*Chilton* now showed cause. There is no authority deciding that where a judge has made an order that a defendant shall not be liable to costs, the plaintiff shall pay costs. [Lord *Abinger* C. B. The second judgment was set aside without costs. What costs does the defendant seek? *J. Jervis*. He claims the costs of pleading.] The rule ought to have stated what costs the party applies for; but at any rate the court will not make the plaintiff pay the costs of the plea.

*Jervis contra*. It is important to settle the practice of this court, and make it conformable with that of the other courts. In the King's Bench the practice is, if the plaintiff takes the money out he is liable to all the subsequent costs, whether there has been a case of vexation or not. Here, after the first order made to pay the money into court, the defendant offered the plaintiff 15*l.* rather than be put to the expense of pleading, but instead of accepting that

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sum the plaintiff signed two judgments, both of which were set aside for irregularity. The defendant is then driven to plead the payment of the money into court, and he ought to be allowed the costs of that payment. [Alderson B. By the order of our brother Bolland the defendant is not to pay costs from that time: nothing more is said, and it seems as if the case, as to costs, was to stand still. The order does not say that the defendant shall receive costs. Parke B. It may be said if the plaintiff takes the money out of court, the effect will be he shall not receive the intermediate costs. A party may have good reason at the time going on, but may afterwards take the money out of court where the defendant has become insolvent.] The court ought to lay down a general rule, and leave it to the party to bring himself within some exception. [Parke B. I think so too. It is on the ground of vexatious conduct that this rule is to be allowed. The question is, whether it is not *prima facie* vexatious to allow a party to receive money which he had refused to pay before. I have always acted on that impression, and I have told parties at chambers, when they refused to pay money, that they would have to pay the subsequent costs, unless they could show good cause of exemption.]

LORD ABINGER C. B.—It is not necessary, in the present instance, to lay down any general rule, but under the particular circumstances of the case I think that this rule ought to be discharged, but without costs. It appears that the plaintiff had reason to think he would recover more than the money paid into court, for it seems that the defendant subsequently offered him a larger sum.

PARKE B.—It may also be added, that looking at



terms of the order, he may have taken the money out of court on the belief that he was not to be liable to the intermediate costs.

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ALDERSON B. concurred.

Rule discharged, without costs.

See *White and others v. Cobham*, post.

### WHITE and Others *against* COBHAM.

**PLATT** had obtained a rule *nisi* why the declaration delivered in this action should not be set aside for irregularity, and why all further proceedings should not be stayed on payment of the plaintiffs' costs prior to the 4th *November*, the debt for which the defendant was arrested having been satisfied; and

The defendant was arrested for 32*l.* 6*d.*, the amount of a bill of exchange, but the sum indorsed on the capias was 39*l.* 3*s.*

6*l.*, which was made up of the 32*l.* 6*d.*, with 7*s.* interest, and of a sum of 6*l.* 16*s.* the amount of a chose in action, which the plaintiffs could not recover in their own names. The defendant took out a summons to stay proceedings on the payment into court of 32*l.* 6*d.* The plaintiffs refused to accept that sum, saying that more was due; whereupon the judge before whom the summons was heard, made an order, dated the 4th *November*, that the defendant should be at liberty to pay the sum refused into court, and if the plaintiffs should recover no more they should not be entitled to costs from that time. On the following day the defendant's attorney wrote to the attorney for the plaintiffs, saying, that he had entered an appearance, and would accept a declaration, if the latter thought it right to continue proceedings in the face of the order. On the 12th the defendant's attorney wrote again, announcing that having received no reply he had paid the money into court. On the 9th *January* the plaintiffs' attorney declared conditionally until special bail was put in and perfected. A rule having been obtained to set aside the declaration for irregularity, and to stay all further proceedings on payment of the plaintiffs' costs prior to the date of the judge's order:—Held, first, that the plaintiffs were entitled to the interest on the bill of exchange; secondly, that the plaintiffs might treat the appearance entered by the defendant as a nullity, and declare conditionally until special bail was put in. And the court discharged the rule, with costs, unless the defendant should elect to pay the interest and the costs of the action up to that time; and in the event of his so electing, the rule to be absolute upon those conditions.

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why the plaintiffs should not pay the costs of the application.

The defendant had been arrested for the sum of 32*l.* 6*d.*, under a *capias* indorsed for bail in the amount, but containing an indorsement claiming 39*l.* 3*s.* 6*d.* as the sum due to the plaintiffs, and 4*l.* costs and stating if that sum was paid within four days, the proceedings should be stayed. On the 3*d* of *November* the defendant took out a summons to stay proceedings on the payment of 32*l.* 6*d.*, with costs, which was attended by both parties on the following day, before Mr. Baron *Bolland*, when the plaintiffs having refused to accept the sum last named, that learned judge made an order that the defendant should be at liberty to pay the same into court, and in the event of the plaintiffs not recovering more, they should not be entitled to costs after that date. On the same day the defendant's attorney wrote to the attorney for the plaintiffs, stating that he had entered an appearance, and would accept a declaration, "if you think it right to continue proceedings in the face of the order." On the 12*th* the defendant's attorney wrote again, saying, that having received no reply he had paid the 32*l.* 6*d.* into court. On the 9*th* *January* the plaintiffs' attorney delivered a declaration with particulars of demand. The declaration was indorsed, "delivered conditionally until special bail be put in and perfected. Defendant to plead within eight days, otherwise judgment." The particulars stated the action was to recover 32*l.* 6*d.* the amount of a bill of exchange, and interest from the day it became due up to the time of signing final judgment. The defendant's attorney swore that when the parties were before Mr. Baron *Bolland*, the clerk to the attorney for the plaintiffs made no claim for interest, but said that the plaintiffs had a further demand to the extent in the whole of 39*l.* 3*s.* 6*d.* On the other hand

the clerk swore that he said a further sum was due, but named no particular amount. He also swore that previous to the writ being issued he wrote to the defendant demanding the sum of 38*l.* 16*s.* 6*d.* (which included the 32*l.* 6*d.* the amount of the bill of exchange, and 6*l.* 16*s.* being a debt due from the defendant to one *Charles Dear*, a bankrupt, and which the plaintiffs had purchased of his assignees,) together with *interest* on the said bill.

Sir *F. Pollock* and *Humfrey* now showed cause. The defendant applied at chambers to pay into court the amount of the bill of exchange, but without any interest, although the bill was some months over-due. The judge's order was nothing more than to pay a certain sum into court, and did not make such payment a satisfaction of the action. The only benefit the defendant could derive from it was, that it enabled him to go to trial upon the question whether he owed more than that amount. If any further sum was due he cannot come to the court and complain as if there had been some oppression used towards him. Part of the plaintiffs' demand consisted of a debt owing by the defendant to the assignees of a bankrupt, which the defendant had promised to pay. [Lord *Abinger* C. B. You could not recover that.] The arrest was only for the legal debt. The plaintiffs claim 7*s.* for interest upon such debt, which it is clear was not an after-thought, for the sum of 39*l.* 3*s.* 6*d.* indorsed on the writ, after including the 6*l.* 16*s.*, cannot be made up without such interest. [Lord *Abinger* C. B. Both parties must have known the amount of the interest. *Parke* B. It does not appear, when they were before the judge, that the defendant asked how much more the plaintiffs were going for. Your case is, that you were entitled to 7*s.* more for interest, and

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that you made no false representations.] Secondly, it is said that the declaration is irregular, because the plaintiffs have declared conditionally. They were, however, entitled so to declare until special bail was put in, and although by paying money into court the defendant got rid of the necessity of putting in special bail, yet as no sum had been paid in for costs, the plaintiffs still had a right to declare conditionally.

*Platt contra.* No claim of interest was made on behalf of the plaintiffs when the parties were before the judge, and it was not incumbent upon the defendant to inquire the particulars of the further sum demanded. If on the 5th of *November* a reply had been sent to the letter of the defendant's attorney, stating that interest upon the bill had not been tendered, there is no doubt the parties would have gone again before a judge and have tendered such interest. In a case during the last term interest was claimed, but the court held it to be an after-thought. [*Parke B.* There is one circumstance which, if it had stood alone, might make the defendant think that the plaintiffs were not going for interest, namely, the demand of a liquidated debt of 39*l.* 3*s.* 6*d.* on the writ. This certainly is not the ordinary way in which interest is claimed, for it is usual to demand it from such a day until the time of judgment, as it runs on until final judgment is signed. The indorsement however is, that if the money is paid in four days proceedings will be stayed, and the plaintiffs may not have thought it worth while to demand interest for those four days ; and they are not restricted to such indorsement as they would be to a particular in the action. The defendant, by comparing the latter with the indorsement on the writ, would have seen that there was a claim of 7*s.* for interest, and he should have paid both principal and interest into court. *Bolland B.*

My impression of the case, when before me at chambers, is, that the defendant offered to pay the 32*l.* 6*d.*, and that the plaintiffs said they claimed more.] With regard to the other point, the plaintiffs had notice that an appearance had been entered. [*Parke B.* They were not bound to accept a common appearance. They treated it as a nullity, inasmuch as the condition prescribed by the act had not been complied with.] The plaintiffs proceeded as if the action was a bailable action; they are in this dilemma, if this action was not bailable the defendant might enter an appearance; if it was bailable then the declaration was irregular, for the judge's order had stayed the proceedings. [*Parke B.* There is no reason why the plaintiffs should not advance themselves in the action until special bail was put in. They could not take any steps against the sheriff.]

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LORD ABINGER C. B.—I do not see that we can say the plaintiffs had not a strict right to be paid the interest upon the bill of exchange, and therefore this rule must be discharged with costs. If the defendant chooses he may have a rule why the proceedings should not be stayed on payment of the 7*s.* interest and costs, or the present rule may be drawn up in the alternative.

PARKE, BOLLAND, and ALDERSON Bs. concurred.

Rule discharged with costs, unless the defendant elect before &c. to pay the costs of the cause up to this time, and 7*s.* interest; and in the event of his so electing, the rule to be absolute upon those conditions.

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WEAVER *against* STOKES.

The defendant had obtained a rule nisi to set aside a warrant of attorney dated the 1st August 1835, on his own affidavit, that when he gave it "he was an infant of the age of 20 years or thereabouts," and on proof of his register of baptism dated the 3d of September 1815. The court discharged the rule, holding that the infancy had not been sufficiently made out.

**G**ODSON had obtained a rule nisi to a warrant of attorney given by the defendant the 1st of August 1835, and all proceedings thereon on the ground that the defendant was under age at the time it was given. The affidavit of the defendant, which the rule was granted, stated, that when the warrant of attorney was executed he was an "infant of the age of 20 years or thereabouts." There was an affidavit setting out a copy of the defendant's baptism on the 3d of September 1815, which was alleged to be a true copy of the parish register. On showing an affidavit was produced from the plaintiff that he swore that at the time the warrant of attorney was given the defendant was carrying on trade as a merchant, and that he appeared to be of the full age of twenty-one years.

*Erle* showed cause, and contended that the infancy of the defendant was not sufficiently made out, as the defendant cannot speak to his own age, and the date of the baptism is no evidence of the time of his birth, and *non constat* that it is the register of his baptism, for there is no proof of identity. No affidavit is produced from any relative or servant who might have sworn positively to his age. This is left to the discretion of the court, and not to interfere unless the fact of the minority is clearly established. Besides the objection, the defendant cannot know when he was born, he only swears in his affidavit distinctly that he was under twenty-one years of age. [*Parke* B. He does not say that he was of twenty years "and no more."] The plaintiff

It with the defendant before, and supplied him with goods, and refused him further credit without producing a warrant of attorney. The defendant has, therefore, held himself out to the world and to the plaintiff as a person of full age.

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*Godson contra.* It is submitted that the affidavit of the defendant's is one on which perjury could be assumed. It states that the defendant is an infant, and that overrides the rest of the sentence. The plaintiff's affidavit does not allege that this statement is false, he merely says, that the defendant appeared to be of age, without even averring his belief that the defendant had attained twenty-one. With respect to the second affidavit, it identifies the defendant's baptismal register. It is not suggested that better evidence could be obtained on the part of the defendant than that which has been produced.

Lord ABINGER C. B.—I am of opinion that this rule ought to be discharged. The defendant can have no accurate knowledge of his own age, and the plaintiff cannot be expected to swear one way or another; all he could swear to was that which he has done, namely, that the defendant appeared to be twenty-one. Suppose the case to be tried, and no other evidence given than that produced here. The defendant's own affidavit would not be evidence, and the register of baptism is no evidence of his birth. The opening of a perjury by the defendant would be considered sufficient *in facie* evidence he was of age, so as to call upon him to give distinct testimony that he was under twenty-one. I do not very well see how he could be indicted for perjury upon this affidavit. The case, therefore, rests upon the naked evidence of the register, which

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only shows he was then living, but is inconclusive : any thing else. To call upon us to interfere, the defendant should have given strong proof of inf which he has not done.

PARKE B.—It does not appear to me that the fancy is sufficiently made out to entitle the defendant to relief.

BOLLAND B.—I am of the same opinion. The defendant swears that he was an infant, without saying any thing more; and he could not be indicted for jury, unless a knowledge of the fact he swears imported into the affidavit. With respect to his minority, it is loosely stated in the second affidavit; for could the party making it know the fact, except he was present when the defendant was baptized?

GURNEY B.—The defendant entered into the curity as if he was of age, and he now comes to set it aside, without showing us distinctly, as he ought have done, that he was under twenty-one at the time when it was given.

Rule discharged, with costs.

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PYTHIAN *against* WHITE and Another.

**TRESPASS.** The first count alleged, in the usual manner, that the defendants broke and entered the closes of the plaintiff (describing each by its abutments), and there forced and broke open &c. certain gates, &c., and broke down &c. certain posts, pales, rails, and stubbs of the plaintiff, standing and being in the said closes, and converted and disposed thereof to their own use. The second count alleged, that the defendants cut down &c. certain posts, pales, rails, and stubbs of the plaintiff, standing and being on certain lands, and took and carried away, and converted the same to their own use.

Pleas: first, as to the breaking and entering &c., enumerating the substantial part of the trespasses in both counts, that the closes in the first count mentioned respectively in which &c. now are, and at the several times when, &c. were, the closes, soil, and freehold of one *Thomas Legh*, wherefore the defendants, the servants of the said *Thomas Legh &c.*, (justifying the trespasses in the usual manner, and stating the posts, &c. in both counts to have been wrongfully placed in the said closes, and to have been removed a short and convenient distance &c., doing no unnecessary damage to the plaintiff &c.) Secondly, to the

Trespass for breaking and entering three closes described by abutments.

Plea, that *the said closes in which &c.* were the closes, soil, and freehold of one *Legh*, with a justification as his servants.

Replication, that before the said times when &c., and before the said *Legh* had any thing in the said closes in which &c., one *R. T.* and *M.* his wife, in right of the latter, one *A. L.* and one *E. K.* were seised in fee of and in two undivided parts of and in the said closes in which &c., and one *A. R.* was also then seised in fee of and in

other undivided part. The replication then set out a fine levied by the said *R. T.* and *M.* his wife of their parts &c. of and in the said closes in which &c. to one *P. M. C.* during the life of the said wife, by virtue of which fine the said *P. M. C.* became seised &c., and then alleged that the said *P. M. C.*, *A. L.*, *F. K.*, and *A. R.* being so seised, afterwards and before the said *Legh* had any thing in the said closes in which &c., and before the said times when &c., demised to the plaintiff, who thereupon entered, and was possessed until the defendants wrongfully broke and entered &c. Rejoinder, traversing the seisin of *R. T.* and *M.* his wife, *A. L.*, *E. K.*, and *A. R.* in the said closes in which &c., whereon issue was joined.

At the trial the plaintiff established her case as to two of the closes, but gave no evidence as to the third. Held, that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the third.

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residue of the declaration, not guilty. Thirdly, to the same trespasses as were enumerated in the first plea, that the said several closes in which &c., before and at the said times when &c., were and are, and from time immemorial have respectively been, within and parcel of the manor of *Newton* and fee of *Mackerfield*, in the county of *Lancaster*, and have been during all that time, and until the wrongful inclosure thereof, part and parcel of a certain waste within the said manor called *Goose Green*, and that the said *Thomas Legh*, long before and at the said times when &c. was lord of the said manor of *Newton* and fee of *Mackerfield*, and in right of his said manor and fee was long before and at the said times when &c. seised in demesne as of fee of and in the said closes in which &c. in right of his said manor and fee; and which said closes, shortly before the said times when &c., had been and then were wrongfully inclosed from the said waste, wherefore &c. (justifying the trespasses as before.)

Issue was joined on the second plea. Replication to the first plea: that before the said times when &c., or any of them, and before the said *T. Legh* had any thing in the said closes in which &c., or any of them, one *Richard Taylor* and *Mary* his wife, in right of his said wife, one *Ann Lunt*, and one *Ellen Knowles*, were seised in their demesne as of fee of and in two undivided third parts, the whole in three equal third parts to be divided, of and in the said closes in which &c. by reason of the said *Mary Taylor*, *Ann Lunt*, and *Ellen Knowles* then living, the daughters and co-heirs of the *Rev. Thomas Knowles* deceased; and one *Ann Renshaw* was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which &c., and the said *Richard Taylor* and *Mary* his wife, being so seised, afterwards, and before the said *T. Legh* had any thing in the said closes

which &c., or any of them, to wit, at or as of the  
 neral sessions of the assizes holden at &c., on &c.,  
 certain fine was had and levied &c. (setting out a fine  
 tween *P. M. C.* plaintiff, and the said *Richard Tay-*  
 and *Mary* his wife defendants, of, amongst other  
 ings, the said parts, shares, and interests of the said  
 .*Taylor* and *Mary* his wife, of and in the said closes  
 which &c.) which said fine was then had and levied  
 amongst other things) to the use of the said *P. M. C.*  
 and his heirs, during the term of the natural life of the  
 said *Mary Taylor*, by virtue of which said fine, and of  
 statute for transferring uses into possession, the said  
*M. C.* then became seised in his demesne as of free-  
 hold, for the term of the natural life of the said *Mary*,  
 and in the said parts, shares, and interests of the  
 said *Richard Taylor* and *Mary* his wife, of and in the  
 said closes in which &c. And the said *P. M. C.*, *Ann*  
*at*, *Ellen Knowles*, and *Ann Renshaw*, being so  
 seised as aforesaid, they afterwards, and before the  
 said *T. Legh* had any thing in the said closes in which  
 &c., or any of them, and before the said times when &c.  
 any of them, to wit, on &c., did, each and every of  
 em, respectively demise his and her part, share and  
 interest, of and in the said closes in which &c., respec-  
 tively to the plaintiff, to have and to hold the same re-  
 spectively to the plaintiff from year to year, &c.; by  
 virtue of which said demises she the said plaintiff after-  
 wards, and before the said several times when &c., or  
 any of them, to wit, on &c. entered into the said closes  
 which &c., with the appurtenances, and became and  
 was possessed thereof, until the defendants wrongfully  
 took and entered the same as in the said declaration  
 set forth in the introductory part of the said first plea is  
 alleged. Verification.

Replication to the last plea: that the said *T. Legh*  
 is not, in right of the said supposed manor and


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fee, at the said several times when &c., or any of them, seised in his demesne as of fee of and in the said closes in which &c. in the said first count mentioned as being part and parcel of any waste within and parcel of the said manor, in manner and form &c. There was also a new assignment of other trespasses than those mentioned in the introductory part of the first and last pleas.

Rejoinder to the replication to the first plea; that, before the said T. Leigh had any thing in the said closes in which &c. the said R. Taylor and Murphy wife, in right of his said wife, the said Ann Lant and Ellen Knowles, were not, nor was any of them, seised in their demesne as of fee of and in two undivided third parts, the whole into three equal parts to be divided, and in the said closes in which &c., by reason of the said Mary Taylor, Ann Lant, and Ellen Knowles, being the daughters and co-heirs of the Rev. Thomas Knowles, or in any other manner, nor was the said Ann Renshaw seised in her demesne as of fee of any in the other undivided third part of the said closes, in which &c., in manner and form &c. The defendants added the *similiter* to the replication to the last plea; and as to the trespasses newly assigned, they suffered judgment by default.

At the trial before Lord Abinger C. B. at the last Liverpool summer assizes, the plaintiff gave no evidence as to the first of the three closes mentioned in the declaration, but established her case with respect to the two other closes. A verdict was taken for the plaintiff, with leave for the defendants to move to enter a verdict as to the first close. In Michaelmas ter Cresswell obtained a rule nisi for setting aside the verdict generally, or to enter a verdict for the defendant with respect to the first close.

*Wightman, Cooching, and Ranshay* showed cause. Assuming the issue raised by the traverse of the first replication to be indivisible, the question is, whether the closes in which &c. mean any other closes than those wherein the trespasses were proved to have been committed, and it is submitted that they do not. The first plea does not apply to all the closes, for if so, it would be needless to add the words "in which &c." The plaintiff showed that the two closes wherein the trespasses were committed belonged to her, and consequently she proved the issue. This point occurred in *Bassett v. Mitchell* (a). There the defendants justified, alleging that the close in which &c. was part of an allotment under an inclosure act. The plaintiff in his replication denied that the said close in which &c. was part of such allotment. At the trial it appeared that the close was not all within the allotment, but that the part in which the actual trespass occurred was, and it was held that the justification was made out. With respect to the record, it will only be evidence at any future trial that the plaintiff was entitled to the closes in which the trespasses were committed: but supposing it to be evidence as to all the closes, the defendants have brought the hardship on themselves, by not pleading the general issue; for if they had done so, they would then have recovered a verdict with respect to the third close. In strictness, however, the issue is divisible, *Tapley v. Wainwright* (b), and the plaintiff is entitled to the verdict as to the two closes, and the defendants with respect to the first close.

*Cresswell, Crompton, and Watson* contra. The plaintiff might have replied separately as to each close, but

(a) 2 B. & Ad. 99.


(b) 5 B. & Ad. 395; 2 Nev. & Man. 697, S. C.

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by her replication she undertook to prove a title to all three, which she has failed in doing, and consequently the defendants are entitled to a verdict for the whole. [Parke B. Suppose the issue had been taken in the pleas, how would the verdict have been?] If the issue had been so taken, and the plaintiff had proved her title to one close, she might have been entitled to a verdict as to such close. But here the plaintiff has assumed that she has a right to all the closes, and has burdened herself with the proof of joint title to them. If this had been an issue on a plea of freehold, it might have been divisible, but the plaintiff sets up a title to the three closes by fine and grant. It is argued that the words "in which &c." in the first plea, do not admit a trespass in each close, but if the defendants plead to one close and admit a trespass by those words, how can it be said that they do not confess a trespass in all? for why should the words confess a trespass more in one close than in another? The cases only establish, that under the words "the closes in which &c." you must show a title to some part of each close, but not that a title may be made out as to one close, and no evidence need be given as to another. *Tapley v. Wainwright* is distinguishable on this ground. [Parke B. If one close is divisible, then *a fortiori* different closes are.] In *Bassett v. Mitchell* (a) Lord Tenterden appears to have thought, that in a case like the present a title must be proved in some part of all the closes named; for he observes, "in *Morewood v. Wood* (b) the court said the defendant would be obliged to prove the prescription on both the places named, but it does not follow that he must have proved it as to every part of each place. The latter was a case of prescription, and here a fine is pleaded, which is stronger than a prescription."

(a) 2 B. &amp; Ad. 103.

(b) 4 T. R. 157.

*Richards v. Peake* (a), *Holroyd J.* says, "If the allegation extends to the whole of *Burgey Cleve Garden*, then the plaintiff has alleged in pleading, and was bound to prove, that the whole of *Burgey Cleve Garden* had been enjoyed and held in severalty for thirty years."

[*Parker B.* Here the issue really is, as to the seisin of the persons named. Surely that is a distributive allegation. The only effect of the fine is to pass all the interest which those parties have. If you had pleaded that nothing had passed by the fine, I should say that such an allegation was distributable.]

*Lord ABINGER C.B.*—Three different closes are specified in this declaration, and the pleas admit trespasses to have been committed in all of them, but justify on the ground that each close is the soil and freehold of another. The plaintiff, by the replication, in effect undertakes to prove that the closes are her freehold. I am of opinion that this allegation is distributable, and that the plaintiff is entitled to hold her verdict as to two of the closes, and that a verdict must be entered for the defendants with respect to the third.

*PARKER B.*—I have no doubt that the issue is just as distributable on this replication as it would have been on a plea of freehold, stating that the three closes were the closes of another person. The allegations as to the freehold &c. seem to me to be divisible, as if they had been repeated with respect to each close. I therefore think the plaintiff is entitled to a verdict as to two of the closes, and the defendants as to the other.

*DOLLAND and GURNEY Bs.* concurred.

Rule accordingly.

(a) 2 B. & Cr. 925.

1836.

Pythian

v.

White  
and Another.

1836.

BRILL *against* CRICK.

An action being ready for trial at the assizes, an agreement was entered into that the cause should be postponed until the next assizes, upon the defendant in that action, and the present defendant, who was his attorney, giving to the plaintiff a promissory note, which was to be given up in case the plaintiff failed in that action, but in case she obtained a verdict it was to be immediately enforced. The note was accordingly made to the plaintiff payable on demand, and after it was signed, a memorandum was indorsed upon it, stating, that the note was given upon the conditions mentioned in the agreement: Held, that the indorsement was merely a marking of the note in order to identify it, and that such indorsement was not part of the note so as to incorporate the agreement with it, and render it an agreement requiring an agreement stamp.

**A**SSUMPSIT. The declaration stated, that before the making of the promise and undertaking, and the promissory note of the defendant, as thereinafter mentioned, an action had been brought in the court of our lord the king, before the barons of the Exchequer at *Westminster*, wherein the now plaintiff was plaintiff, and *John Robinson* was defendant; and issue having been joined between the parties thereto, such proceedings were therein had, that at the assizes held at *Chelmsford*, in and for the county of *Essex*, on the 9th *March* 1835, before &c., it was ordered by the court by and with the consent of the parties, their counsel and attornies, that the trial of that cause should be postponed until the then next assizes, and that the said *John Robinson* should pay the costs of the day (to be taxed), and give security to the satisfaction of *Mr. Robert Bartlett* of &c., on or before *Thursday* the 12th day of *March* then instant, for the damages and costs (if any) to be recovered in that action. And thereupon heretofore, to wit, on the 12th of *March* 1835, by an agreement then made and entered into between *George Shaw*, the attorney for the plaintiff, and the now defendant, the attorney for the said *John Robinson*, the said *George Shaw* and the now defendant, did thereby agree and declare that the said cause, after being called on, and a motion made on the part of the said *John Robinson* to postpone the same in consequence of the absence of *M. W.*, alleged to be a material and necessary witness for the said *John Robinson*, should be, with the consent of the plaintiff, postponed, and the said order



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of *nisi prius* thereto annexed, made accordingly upon the following conditions; that is to say: that the now defendant should, as the said *John Robinson's* attorney, and the said *John Robinson*, in pursuance of such order and condition, and in consideration of such postponement as aforesaid, sign a promissory note, payable to the plaintiff for the sum of 500*l.* the amount of damages laid in the declaration of the said cause. And it was thereby agreed, that the said note should remain in the custody of the said *George Shaw* until the trial of the said cause, the said *George Shaw* undertaking not to permit the said note to be negotiated in the interval. And the said *George Shaw* undertook, that if a verdict and judgment should be obtained by the said *John Robinson*, or the plaintiff should ultimately be consulted, the said *George Shaw* should deliver up to the now defendant the said promissory note, without payment of the sum secured, or any part thereof. And it was further agreed, that in case the plaintiff should obtain a verdict and judgment, the said promissory note should be immediately enforced for the full amount of damages found or given for the plaintiff, with costs to be taxed by the proper officer. And the plaintiff avers, that in pursuance of the said agreement, and for the consideration aforesaid, the defendant and the said *John Robinson* did afterwards, to wit, on the 12th of *March* 1835, sign and deliver to plaintiff a promissory note dated the day and year last aforesaid, and whereby they jointly and severally promised to pay to plaintiff or order 500*l.* on demand. And by a memorandum then indorsed on the back of the said note, it was declared by the defendant and the said *John Robinson*, that the said note was given upon the conditions mentioned in the said agreement, and in pursuance of the said order of *nisi prius*. The declaration then averred, that at the following assizes at *Chelmsford*, the plaintiff

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obtained a verdict for 436*l.* 12*s.* 6*d.*, and in the course of the ensuing *Michaelmas* term recovered a judgment in the Exchequer for that sum, and 75*l.* 4*s.* 6*d.* costs, of which the defendant had notice, and then alleged a breach, that the defendant had not hitherto, nor had the said *John Robinson* paid the said sum in the said note specified, nor had either of them paid the said damages, costs, and charges, and the same remained due and unpaid.

The first plea set out the agreement mentioned in the declaration in *hæc verba*, and alleged that the said agreement was so made by the defendant, as the attorney for the said *John Robinson*, as is therein mentioned, and with the said *George Shaw* in manner as therein mentioned, and that the written instrument in the said declaration mentioned, and therein called a promissory note, was and is in the words and figures following, that is to say:

£500. 12th March 1895.  
We jointly and severally promise to pay to Miss *Eliz. H. Brill* or order, the sum of five hundred pounds on demand.

And that the memorandum indorsed thereon, as in that behalf in that declaration alleged, was and is in the words following, that is to say:

"This note is given upon the conditions mentioned in the memorandum of agreement hereto annexed, (meaning the said memorandum of agreement heretofore particularly mentioned) and in pursuance of the order of *nisi prius* hereto annexed, (meaning the order of *nisi prius* in the said declaration first mentioned.)"

That the said written instrument in the declaration mentioned, and therein called a promissory note, at the time of the making the same as in the declaration mentioned, and at the time of the delivering of the said declaration by the plaintiff in this suit, was marked an

stamped with the stamp lawful and proper for a promissory note payable to order on demand, and that the said last-mentioned instrument in writing, at the time of the making the same, and at the time of the delivering of the declaration by the plaintiff in this suit, was not stamped or marked with the stamp lawful and proper for an agreement, or with any stamp other than the stamp lawful and proper for a promissory note as aforesaid; without this that the defendant promised in manner and form as in the declaration is alleged; and concluding to the country.

Second plea, that the defendant did not make the said promissory note *modo et formâ*. There was a third plea, which it is not material to state. Issue was joined upon the pleas.

At the trial before Alderson B. at Guildhall, during the present term, the promissory note, with the agreement annexed to it, was produced on the part of the plaintiff, the note having upon it the indorsement set out in the first plea, which was proved to have been written on the note immediately after it was signed, but such indorsement was not signed by both the parties to the note, but only by the defendant. It was objected by the defendant's counsel, first, that the instrument was an agreement, and required an agreement stamp; and secondly, that it was not valid as a promissory note, inasmuch as it was payable on a contingency. The learned judge overruled both objections, giving the defendant leave to move, and the plaintiff recovered a verdict for 436*l.* 12*s.* 6*d.*

The *riger* now moved to enter a verdict for the defendant upon the two first issues, or in arrest of judgment, for a defect in the declaration. This instrument is not valid as a promissory note, for it is payable upon the contingency mentioned in the agreement, with which,

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by the indorsement, it was incorporated. It therefore operated as an agreement, and should have been stamped as such. The cases of *Leeds v. Lonsdale* (a), and *Hartley v. Wilkinson* (b), show, that indorsements on promissory notes, declaring them to be given on certain conditions, render them invalid as notes, and that such instruments are agreements, and should be so stamped. [Parke B. This is a note payable to order. Suppose some one were to erase the indorsement upon it, and it was then indorsed over to a third party for a valuable consideration without notice, could not such party sue upon it? whereas he could not do so if the indorsement had been parcel of the note for then the erasing of it would have been a forgery. Here the memorandum is not parcel of the note. The cases cited were decided on the ground that the indorsement was part of the note. Alderson B. To support your view you must go this length, that even if the conditions of the indorsement are not fulfilled, the note could not be sued upon as a note.] It is submitted, that this instrument never was a note, and that there is no distinction between the present and the two cases cited. Where a party puts his hand to a note it is not an absolute note if it is accompanied by an agreement which restrains it from being negotiated. It is true that, in the cases cited, the indorsements were on the notes before they were signed, but when the indorsement is part of the same transaction, it can make no difference whether such indorsement is written before or after. Here it was proved that the indorsement was made immediately after the signing of the note, and formed part of the same transaction. This case is distinguishable from *Stone v. Metcalfe* (c); all that the latter case decided was, that where a party has delivered a note absolutely, that an indorsement

(a) 2 Camp. 205.

(b) 4 Camp. 127.

(c) 4 Camp. 217.

afterwards made upon it, will not render it an agreement. Here the note never was delivered in a perfect state, for at the time it was signed there was an understanding among the parties, that the indorsement was to be written upon it in order to restrain its negotiability. Secondly, if this instrument was a promissory note, it should have been declared upon as such. Instead of so doing, the plaintiff, although he shows that it is a note, has set out the agreement and the indorsement made upon the note.

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LORD ABINGER C. B.—There is no difference of opinion among the court, that the agreement was collateral to the note, and that the latter did not require an agreement stamp.

PARKER B.—It is clear that the indorsement was not meant to alter the legal effect of the note, but was merely made for the purpose of marking it, and showing that it was the note referred to in the agreement. It was not signed by both the parties to the note, who were therefore not parties to it. With respect to the second point, the plaintiff calls the instrument a note in the declaration. He avers that it was signed and delivered, and that the indorsement was *then* made upon it. That averment brings the case within the principle of *Stone v. Metcalfe*.

ALDERSON B. concurred.

Rule refused.

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1836.

STRACY *against* BLAKE.

An admission on the face of one issue, cannot be used as evidence to prove or disprove another issue.

But where a particular fact was admitted by both parties throughout the trial, the court refused to grant a new trial, on the ground that the judge stated to the jury, that the fact so admitted was admitted on the record, and used such admission on the record in support of another issue.

**D**EBT for money lent, money paid, and on an account stated. Pleas: first, never indebted. Secondly, that after the supposed debts and said several causes of action, and each of them, in the declaration mentioned, accrued to the plaintiff, to wit, on &c., he the defendant was a prisoner in the custody of the warden of his majesty's prison of the *Fleet*, within the walls of the said prison, upon process of execution of the suit of one *William Pitfold*, within the meaning of the 7 G. 4. c. 57. And that afterwards, and while the defendant remained in custody as aforesaid, and within the space of fourteen days next after the commencement of the actual custody aforesaid, to wit, on &c., he the defendant did duly apply by petition in a summary way to the Court for Relief of Insolvent Debtors in *England*, for his discharge from the custody aforesaid, according to the provisions of the said act, and in compliance therewith. And the defendant did then subscribe such petition and filed the same in the said court. And that at the time of subscribing the said petition, to wit, on &c., he the defendant did duly execute a conveyance and assignment to one *S. S. gentleman*, then being the provisional assignee of the said court, in such form as is to the said act annexed, of all the estate, &c. of the defendant as such prisoner, in and to all the real and personal estate and effects of the defendant both within this realm and abroad, except &c. And that afterwards and within fourteen days next after his said petition had been filed as aforesaid, and after the said supposed debts and causes of action in the declaration mentioned had accrued, to wit, on &c., he the defendant did deliver unto the said court a

chedule containing as in the said act is required, except as hereinafter mentioned, and duly subscribed by the defendant, and which said schedule was then duly filed in the said court as by the said act is required. And that afterwards, to wit, on &c., at and before the court for the Relief of Insolvent Debtors in *England*, and in &c., the matters of such petition and schedule came on to be heard and duly examined into, before the said court. And the defendant then appeared to the said court to be discharged from custody and entitled to the benefit of the said act, and the said court did then duly adjudge the defendant to be discharged from custody, and to be entitled to the benefit of the said act in pursuance of the provisions of the said act, and the defendant was accordingly then discharged from the custody aforesaid. And the defendant further saith, that no description whatsoever of the said debts or debt, or causes of action, or any or other of them, so in the said declaration alleged to have been due from the defendant to the plaintiff, and to have accrued to the plaintiff in the manner in the declaration mentioned, or of the plaintiff, was contained or inserted in the said schedule so subscribed and filed aforesaid, at the time of such subscription or filing, or at any other or subsequent time: and that the said descriptions were and each of them was omitted from and out of the said schedule in the manner and at the times aforesaid, by and with the full knowledge and consent, and by and through the contrivance and procurement of the plaintiff. Verification.

Replication to the second plea, that the defendant, of his own wrong, and at his own sole instance and free will, and with intent to deceive and defraud the plaintiff in that behalf, omitted the said several debts and causes of action in the declaration mentioned, and the description of the same, from and out of his the de-

At the trial before Lord Abinger C. B., at minster sittings after last *Michaelmas* term, it was that the action was brought to recover money of the plaintiff in discharge of an attorney's bill on the following circumstances:—The defendant had been a guard of the *London and Devonport* railway, and had been dismissed in consequence of a letter sent to the post-office by a Captain *Pitfold*, complaining of the defendant having used rude language to his wife, who was a passenger. The defendant then brought an action for libel against Captain *Pitfold*, on the advice of the plaintiff, who was then a clerk, and who employed a Mr. *Rosser* as the plaintiff's attorney. That gentleman accordingly brought the case for and on account of the defendant, on the understanding that the defendant or his agent should supply him with the necessary funds to prosecute the suit. The cause, after having been once withdrawn, was tried at the *Exeter* spring assizes 1832, before Justice *Taunton*, when the jury, under the direction of the learned judge, found a verdict for Captain *Pitfold* on the ground that the alleged libel was a defamatory communication. *Rosser's* bill was paid by the plaintiff. On the part of the plaintiff several letters to the defendant were put in, bearing date in the month of 1831, in which he urged the prosecution.



as alleged that the action was the action of the plaintiff, and not of the defendant, and that the former took it gratuitously on the chance of recovering it from Captain *Pitfold*. To establish this point the letters of the plaintiff were given in evidence. *Rosser* also, in his cross-examination, stated that the plaintiff called on him after the defendant went to prison, and told him that his (*Rosser's*) name would be put in the schedule, for it would not look well if only Captain *Pitfold's* name only appeared in it, adding, that he would see that his (*Rosser's*) costs were paid; and when the schedule was preparing, the plaintiff said that *Rosser* might look to him for his costs. The defendant's counsel contended, on the authority of *Hard v. Bartolozzi* (a), and *Tabram v. Freeman* (b), that the defendant was entitled to a verdict on the special plea, inasmuch as it was apparent that the debt was omitted from the schedule by the procurement of the plaintiff. The schedule, which was in court, was given in evidence, it being assumed on both sides, throughout the case, that the plaintiff's debt was omitted. The lord chief baron left two questions to the jury: first, whether the defendant ever was indebted to the plaintiff; and secondly, whether the omission of the debt from the schedule was through the contrivance of the plaintiff. His lordship, after commenting on the evidence, told the jury, that if they found that the whole management of the schedule was in the plaintiff's hands, he thought that was evidence that the plaintiff had no claim upon the defendant, as he would have allowed the latter to take a false receipt; adding, that the omission of the debt was admitted on the record, and that such omission, coupled with the other evidence, went far to show there was no debt due at all.

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(a) 4 B. &amp; Ad. 555; 1 Nev. &amp; Man. 69.

(b) 4 Tyr. 18).

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*Humfrey* now moved for a new trial, on the ground of misdirection. The schedule not having been given in evidence, there was no proof of the debt, for the omission of the debt is not admitted upon the record. There was consequently a misdirection in stating to the jury, in summing up, that such omission was admitted on the pleadings. [*Parke* B. Did you object to the schedule not having been produced, or observe to the jury on its non-production? You should have taken an objection, that there was no evidence to support the second plea.] The lord chief baron, speaking of the first issue, said that it was admitted on the second issue that the debt was omitted, and the second issue was used as an argument upon the first, that the defendant never was indebted to the plaintiff. [*Alderson* B. On the second issue both parties were contending *quod animo* the debt was omitted. Suppose there had been a dispute between the parties, and it was proved that they had controverted before a third person, but had both admitted one fact, could not that fact be shown before a jury to have been admitted?] Even supposing the fact to be admitted on the face of one issue, it is controverted on the other issue. It is important since the new rules to know what facts are admitted in the pleadings, and whether, on taking issue upon a single fact, all the rest are to be considered as admitted. In *Noel v. Boyd* (a), the court were unanimously of opinion, that the facts on which issue is not taken are to be deemed as not being in controversy, and that they are not to be held as being admitted as true. [*Alderson* B. I have not exactly made up my mind upon that point. I mean that it is still open to discussion.] Since the case of *Heath v. Sansom* (b), where ever want of consideration is proved between the origi-

(a) See *ante*, 211.

(b) 2 B. &amp; Ad. 291.

parties, it is incumbent upon the holder to show consideration (a). Therefore if a mere non-denial is taken as an admission, there is no case where an action is brought on a bill of exchange in which a plaintiff cannot be forced to prove consideration, and that purpose one plea will do, unless the plaintiff reply *de injuria* (b). [Lord Abinger C. B. Is the proposition this, that an admission in one plea is to be used on another? If so I agree with you. Lord B. It is quite clear that each issue must be tried by itself, and an admission on one cannot be used on another issue. You are to try the issue on *nunquam solvitus*, as if there was no other issue upon the record. Where in trespass a defendant pleads not guilty, and also a justification of a right of way, it is held that the admission made by the latter plea cannot be used to disprove the plea of not guilty.] In the present case, even if an admission on one issue can be used on another, the admission taken most strongly against the plaintiff, amounts to no more than that if the debt was omitted, it was without the plaintiff's knowledge.

LORD ABINGER C. B. having read his notes of the case added,—If it is a ground for a new trial, that a judge, after commenting upon the evidence, says there is no admission on the pleadings of the debt being proved, then this plaintiff is entitled to what he seeks.

MR. B.—I certainly should have thought it fit to ask for a new trial, if the lord chief baron had nakedly told down that the jury might look at an admission.

But see *Percival v. Frampton*, 5 Tyr. 579; and *Isaac v. Farrar*, ante,

it has been decided he may. See *Isaac v. Farrar*, ante, 281; and *Yates*, 2 Bing. N. C. 579.

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made on one issue to disprove another, and there had been no evidence independent of such admission. It is clear on principle that each issue must be tried by itself. But in the present case there appears to have been an admission on both sides, of the fact that the debt was omitted, and his lordship seems to have referred to the record only by way of illustration. That certainly was irregular, and if there had been no other evidence—if the omission of the debt had not been admitted by both parties throughout the cause,—I should have thought that there ought to have been a new trial.

ALDERSON B.—There is no difference of opinion in the court, that an admission in one plea cannot be used as evidence on another. But I am not prepared to say that if parties are disposed to admit facts on one issue, that the jury may not take them into their consideration in deciding all the issues in the cause. When parties are controverting two matters before a jury, and on one the defendant says, that he was never indebted, and on the other, that the debt was omitted from his schedule by the contrivance of the plaintiff, it is not unreasonable for the jury to ask themselves how comes there to be any controversy as to the latter fact. Here the fact of the debt having been omitted, seems to have been admitted throughout the trial, and may not the jury draw the same conclusion with respect to that fact, as though it had been formally proved in evidence? The case appears in substance to have been properly left to the jury, the allusion to the record being merely as an illustration.

GURNEY B.—The only question in controversy seems to have been by whom the omission was made

or the parties appear to have admitted that the debt was in fact omitted.

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LORD ABINGER C. B.—Before the jury returned their verdict for the defendant, they must have expressly found upon the second issue, that the debt was omitted from the schedule by the contrivance of the plaintiff, and they could not so find without its having some effect on the other plea. There is no doubt that an admission in one plea, cannot be taken as evidence to support another issue. But suppose, (to take the instance put by my brother *Parke*,) in an action of trespass, to which not guilty and a justification of a right of way are pleaded, it is shown on the general issue that the defendant came to the *locus in quo* asserting such right of way, would not that prove the trespass under the general issue? In the present case the counsel on both sides admitted the fact that the debt was omitted. If the jury were satisfied that the plaintiff had the management of the defendant's schedule, and that he went to *Rosser* to put his name into the schedule in order that another name might appear besides Captain *Pitfold's*, they might well conclude that he did not intend to insert his own. The only thing that can be complained of was in my saying, that the fact was admitted upon the record, instead of stating that it was admitted by the counsel and proved by the evidence.

Rule refused.

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1886.

**ODY and Others, Assignees of FRANCIS MOORE Younger, a Bankrupt, against COOKNEY and LIAMS.**

In an action of trover by the assignees of a bankrupt for the lease, utensils and stock-in-trade of a vinegar manufactory, it appeared that the bankrupt was in possession of the premises, and carried on the business for some years previous to July 1834. In that month the defendants came into possession, and continued the business. A letter dated in March 1834, from C. one of the defendants, was given in evidence, which showed that the bankrupt was then in embarrassed

circumstances and wished to dispose of the manufactory, and that he was to C. in 3500*l.*, and that C. then stated the bankrupt had no money, and not go on. No evidence was adduced of any assignment of the goods in by the bankrupt to C. The fiat bore date in January 1835.

The plaintiffs having submitted to a nonsuit, the court refused to disturb the ground that *prima facie* the act of bankruptcy must be taken to have been committed at the time the fiat bore date, and that there was no evidence of bankruptcy (which is to be proved and not to be presumed) committed by the bankrupt in July 1834.

To establish a *prima facie* case of possession of property by a bankrupt, his must show that his possession continued down to the time of the bankruptcy

**T**ROVER for the lease of certain premises in Albany Road, in the county of Surrey, and utensils and stock-in-trade of a vinegar manufactory. The declaration contained two counts; the first, alleging a possession by Moore the younger before he became a bankrupt; and the second, alleging a possession in the assignees. Pleas: first, not guilty; secondly, denying the possession and right of possession of Moore the younger before he became a bankrupt; thirdly, denying the possession and right of possession of the assignees; fourthly, a transfer by Moore the younger to Cookney, for a *bonâ fide* valuable consideration; that Moore and the defendant Cookney were tenants in common of the goods and chattels mentioned in the first count of the declaration. There were five pleas, which it is not material to state.

Replication to the fourth plea, that Moore the younger made the said assignment to the defendant Cookney voluntarily and in contemplation of becoming such bankrupt as aforesaid, and with a view and intention of giving a fraudulent preference to Cookney.

his other creditors: without this, that *Moore*, for a *bonâ fide* valuable consideration, made the assignment to *Cookney*; upon which issue was joined.

Replication to the fifth plea, *de injuriâ*.

At the trial before Lord *Abinger* C. B. at the *London* sittings after last *Michaelmas* term, it appeared that *Moore* the younger had carried on the business of a vinegar manufacturer in the *Albany Road* for some years previous to 1834. An excise officer was called on the part of the plaintiffs, who proved *Moore* the younger to have been in possession of the premises and conducting the business down to *July* in that year, when he was succeeded by the defendant *Williams*, (who was the father-in-law of the defendant *Cookney*,) who from that period acted as the owner of the manufactory. A letter written by *Cookney* to *Moore* the younger was put in, dated in *September* 1831, respecting the loan to *Moore* the younger of 500*l.* by a Mr. *Hulme*, which was to be secured by the joint warrant of attorney of *Moore* the younger and his father; as also another letter, without a date, from *Cookney* to the father, relating to some bills which *Cookney* had discounted for him and his son. A third letter, dated the 15th *March* 1834, from *Cookney* to *Moore* the younger, was likewise given in evidence, saying that he had been trying what he could do for *Moore* the younger, but his efforts had been fruitless, and that he thought of advertising for a man of money as a partner for *Moore* the younger. A fourth letter, written in *March* 1834, from *Cookney* to *Moore* the father, was also adduced, of which the following are extracts.

"I have had a gentleman here to-day, desired by the gentleman I wrote to (who is Mr. *Hulme*'s brother,) requesting to see the factory with a view to a purchase or something. I gave him a card, and told him the sum wanted was about 5000 guineas, but that he had better see you."

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expressly understood, I am to have my 3500*l.*, if not 10*l.* interest, out of the proceeds of the sale, so that I shall have what to say to induce any one to take to the concern by subscription in part of their purchase money." \* \*

The fiat of bankruptcy bore date the 6th 1835. The solicitor to the assignees was called on being asked the amount of assets that he realised from the bankrupt's estate, replied that the lord chief baron refused to admit the evidence. He was also asked the amount of debt due from the bankrupt, but the lord chief baron would not allow the question to be put. A demand for stock-in-trade and utensils from both the defendants and a refusal by them to deliver them up, was the only evidence given of the lease of the premises having been in the possession of either of the defendants: neither was any proof adduced of any assignment made by the bankrupt to *Cookney* of the stock-in-trade or utensils in trade of the former. On the closing of the plaintiff's case, it was objected on the part of the defendants, that as there was no evidence of a declaration of bankruptcy in *July* 1834, it was not proper to show that eight months before the assignment was brought, the bankrupt was in possession of the premises and chattels, but that a continued possession from the time of the bankruptcy should have been shown.




ury, and in summing up the evidence told them that it was for them to say whether there was any evidence from which they could infer that an act of bankruptcy had been committed in *July* 1834, giving it as his opinion, that there was hardly any ground for such a conclusion; and he also put it to them, whether, in the absence of any proof on the part of the plaintiffs, they could presume that the possession of the defendants was wrongful. At the conclusion of his lordship's address the counsel for the plaintiff elected to be non-suited.

*Erle* now applied for a new trial, on the ground of misdirection on the part of the lord chief baron. It was shown at the trial, that the bankrupt was the proprietor and manager of the manufactory from the year 1828 down to 1834, which, it is submitted, was a sufficient *prima facie* case on the part of the plaintiffs to put upon the defendants for an answer. In *July* 1834 the defendants seem to have had possession of the premises, and to have carried on the business; and, to rebut the presumption arising from that fact, the plaintiffs gave in evidence several letters written by the defendant *Cookney*, from which it appeared that he was an attorney who was in the habit of lending money, and that he knew the bankrupt was in insolvent circumstances. The last letter adduced clearly shows that he was about to take possession of the whole property, and was aware that the bankrupt was then insolvent; for he says expressly, that the bankrupt had no money and could not go on. Therefore, whatever he could set up, must have been acquired by an assignment of all the bankrupt's property when he was in insolvent circumstances, and consequently such assignment was an act of bankruptcy, comprising, as it did, the whole effects of a trader in a state of insol-

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vency. [*Parke B.* How do you prove that it included the whole?] *Cookney* himself says the bankrupt had no money. Upon the issues as to the right of property, the plaintiffs showed a possession by the bankrupts down to *July* 1834, and that the defendant *Cookney* then came in by some assignment. [*Parke B.* You do not prove any possession down to the time of the bankruptcy. Unless you can show a previous date to the act of bankruptcy, it must be concluded that it took place immediately before the fiat. The fiat is dated in *January*, and therefore there is *prima facie* an act of bankruptcy then. Now you cannot establish a *prima facie* case of possession by the bankrupt unless you show his possession to that time. You are consequently compelled to make out that there is *prima facie* proof of an act of bankruptcy in the way in which the defendants became possessed of the property. *Alderson B.* There was no evidence but that the property, at an antecedent period, belonged to the bankrupt. *Parke B.* You cannot prove an act of bankruptcy without showing that you are out of court upon another plea. You are in this difficulty; you cannot rely upon an act of bankruptcy by fraudulent assignment, for you give no evidence of any assignment. It might be by a fraudulent delivery, but you do not show that it comprised all his property; and supposing you established that, you are out of court on the plea of not guilty, which denies the conversion, or on that which denies the right of property to be in the plaintiffs.] The plaintiffs showed that the whole property passed to a creditor, who knew the bankrupt was in insolvent circumstances, which distinguishes the case from *Barter v. Pritchard* (a), where the purchaser paid a fair price for the goods, and was ignorant of the trader's design to abscond from his creditors. [*Parke B.* The only

(a) 1 Ad. & E. 456.

int is, whether there was evidence or not to go to a jury of this being an act of bankruptcy. It appears that the lord chief baron told them that there was no evidence.] His lordship said there was no evidence of any act of bankruptcy. [Lord Abinger C. B. told the jury that an act of bankruptcy should not be assumed.] It was material to the plaintiffs' case to know the extent of assets realized from the bankrupt's estate, and also the amount of debts owing to him; but the lord chief baron refused to receive in evidence the answer to the inquiry respecting the former, and would not permit the question as to the latter to be put. It was submitted that there was evidence of the bankrupt having parted with his whole property, and thereby having committed an act of bankruptcy, which, if answered by the defendants, entitled the plaintiffs to a verdict.

PARKE B.—I understand from the lord chief baron, that he did say that there was some slight evidence of an act of bankruptcy in *July* 1834, and left the case to the jury. You now say that an objection was made, that there was really no evidence of an act of bankruptcy, and, looking at what was proved, it appears to me that the observation was correct. It was shown that the business was carried on by the bankrupt, apparently as master, up to the month of *July* 1834. The bankruptcy took place in *January* 1835, and *prima facie* the act of bankruptcy must be taken to happen at the time the commission issues, so that the plaintiffs cannot succeed in this action unless they can prove an act of bankruptcy anterior to that period. Now it is said that the act of bankruptcy was committed by the delivery or transfer of property by *Moore* the bankrupt to the defendant *Cookney*, and it is contended, that the plaintiffs have given *prima facie*

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solvency. The plaintiffs are bound to prove these two facts. Now they cannot show fraudulent delivery, because it is done at the direction of *Cookney* himself, who writes a warrant manding security or satisfaction for 3500 advances. There is therefore no evidence of fraudulent delivery, and consequently the plaintiff is bound to satisfy the jury, by sufficient evidence, that there was a transfer to *Cookney* of all the effects of the bankrupt, which would create an insolvency. Now it appears to me that the plaintiff has not done that. It is not enough to state the state of the assets when they came into the hands of the trustee eight months afterwards, for they ought to show the condition of the assets was at the time of the transaction. How can it be shown that there have been outstanding debts to the concern of the bankrupt coming in, from different sources, sufficient to create the debts of the bankrupt? It appears to me, that the lord chief baron would have been correct in saying that there was no evidence of an assignment in bankruptcy in *July* 1834, and certainly there is no evidence to imply it without evidence. The burthen is cast on the plaintiffs, for the act of bankruptcy is proved, and not to be presumed.

ALDERSON B.—I am of the same opinion as the lord chief baron, to me that there was no evidence at all to

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Doe dem. Earl of FALMOUTH *against* ALDERSON.

**MANNING** had obtained a rule *nisi* to set aside an interlocutory judgment which had been signed in this cause for want of a sufficient consent rule. The ejectment was for lands and mines in *Cornwall*, to which the defendant appeared and entered into a consent rule, which the plaintiff considered as insufficient, and signed judgment by default. Leave having been given to amend, the defendant entered into another consent rule, to which the plaintiff also objected, and again signed judgment. The present consent rule was in the following terms: "The premises are admitted to consist of certain tin-work bounds situate in *Belserden Beacon*, or *Becken Bounds* or *Common*, containing 48 acres or thereabouts, and also containing a certain tin-mine under the same, together with a liberty and right to dig and search for tin within the limits of and under the said bounds, being parcel of the premises mentioned in the declaration."

In ejectment for lands and mines in *Cornwall*, the defendant cannot defend for tin-bounds containing a certain tin-mine, with a right and liberty to dig and search for tin within the same bounds; for an ejectment will not lie for a tin-bound.

The defence should be for a mine lying within certain bounds.

*Butt* now showed cause. The defendant proposes to defend for certain tin-bounds which are mere easements, for which an ejectment will not lie. A tin-bound is only a right to enter and mark out a certain boundary. The plaintiff does not bring his ejectment for a tin-bound, but for a mine, and the defendant ought to defend the possession of all or some part of the premises.

*Manning* in support of the rule. A tin-bound is not a mere easement. The nature of a tin-bound, and the mode in which a title to it is acquired, are described in the notes to *Rowe v. Brenton* (a), which show, that

(a) 3 Man. & Ryl. 497, note (a).

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after a party has taken the regular steps for obtaining possession of the bound, possession is delivered to him by the bailiff of the stannaries under a writ of possession which issues to the latter. Possession is not delivered of the mines, which are unopened, but of the land itself in respect of the mines, and the party may defend for this qualified possession under the local description of "tin-bounds." [*Parke B.* If 'tin-bounds give you a right to the mine, why not defend for a mine?'] In *Jenkins v. Davy* (b), 30 *Hen.* 8. in trespass *quare clausum fregit*, the defendant justified in respect of "tin-bounds," and the issue would seem to have been found for him. The bounds must be renewed annually, or the lord may re-enter, which shows that he was out of possession.

**LORD ABINGER C. B.**—The owner of tin-bounds has no right to the surface, he has only a right to enter and sink a mine. Why should you not say that you defend for a mine lying within certain bounds? The consent rule must be amended, for in its present form it applies to nothing for which an ejectment will lie.

**PARKE B.**—You say that the owner of tin-bounds has a right to the subsoil, which would entitle him to maintain trespass against the owner of any other mine who broke into it. Why not defend for a mine lying within certain bounds called tin-bounds?

Rule absolute on payment of costs, the defendant to be at liberty to amend again.

(a) In the book called the "Bailiff of Blackmore," Harl. MSS. 6380, p. 7.

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*DOE dem. MORRIS against ROE.*

THIS was an ejectment brought by a landlord against a tenant on a forfeiture incurred by the breach of covenants in a lease. The lessor of the plaintiff had let a lease to one *Davies*, who assigned it by way of mortgage to one *Jones*. The lessor not having, as alleged, any counterpart, applied to *Davies* for an execution of the lease, and was referred to the mortgage. The attorney of the lessor accordingly made application to *Jones*, but the latter refused to allow inspection. *J. Jervis* having obtained a rule *nisi* against *Jones* the mortgagee should not allow the lessor or plaintiff to take a copy of the lease, and why the former should not pay the costs of the application, Where a lease is executed by both the landlord and tenant, the lessor not having a counterpart, is entitled, on bringing ejectment for a forfeiture, to demand an inspection and copy of the lease from a mortgagee to whom it has been assigned by way of mortgage.

*V. Richards* showed cause. He contended that the mortgagee was not bound to disclose his title, and he ought not to be called upon to produce the lease, which the lessor of the plaintiff wished to inspect, for the purpose of enabling him to defeat the mortgagee's security.

*vis contrà*. The mortgagee being an assignee of the lease, stands precisely in the same situation as the tenant, and takes the lease, subject to the same liabilities as the original tenant. In this case, as there is only one part of the lease, the lessee was trustee of the instrument for the benefit of the lessor, if he executed it.

*MR. B.*—It must be referred to the master to ascertain whether the lease was executed by both parties; for if so, it carried upon the face of it notice

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of an implied trust on the part of the tenant for its production at the request of the lessor. Should that prove to be the case, a copy must be given, but not otherwise.

**BARTLETT against WATKINS.**

The 5 Geo. 4. c. lxxix. "for lighting and watching the parish of Clifton, in the county of Gloucester," does not extend to the parts of the parish of Clifton which by the 16 Geo. 3. c. 33. and 43 Geo. 3. c. 140. were added to the city of Bristol.

**TRESPASS** against the defendant, who was a constable of the parish of *Clifton*, in the county of *Gloucester*, for seizing and taking away a cart-wheel belonging to the plaintiff. Plea, not guilty.

At the trial before *Gurney B.*, at the last *Bristol* summer assizes, a warrant of distress, signed by a magistrate of the county of *Gloucester*, for non-payment of a rate for lighting and watching the parish of *Clifton*, made under the 5 Geo. 4. c. 79. intituled, "An act for lighting and watching the parish of *Clifton*, in the county of *Gloucester*," was given in evidence on the part of the defendant. A question then arose, whether the jurisdiction of the justices of the county of *Gloucester*, within the part of the parish of *Clifton* in which the plaintiff's house was situate, was taken away by the 16 Geo. 3. c. 33. intituled, "An act to remove the danger of fire among the ships in the port of *Bristol*, by preventing the landing certain commodities on the present quay; and for providing a convenient quay; and for providing proper places for landing and storing the same; and for regulating the said quay, and the lighters, boats, and other vessels, carrying goods for hire within the said port of *Bristol*, and for other purposes therein mentioned."

The 17th section of the latter act enacts, "That from and after the 29th day of *September* 1776, all that part of the parish of *Clifton*, &c. [therein described,



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nd in which the plaintiff's house was situate,] shall be  
o all intents and purposes whatsoever, except as here-  
after mentioned, *wholly exempted and separated from*  
*the county of Gloucester*, and from all *jurisdiction*,  
power, and authority of all sheriffs, escheators, coro-  
ners, *justices*, &c. of the county of *Gloucester* for  
ever, and may and shall be taken and accepted as  
member of the city of *Bristol*, and county of the same  
city, and *within the jurisdiction*, power, and authority  
of the mayor, sheriffs, coroners, escheators, *justices*,  
&c. of the said city, and county of the same for ever,  
fully and amply as if the same had been part and  
parcel of the said county and city before and at the  
time of granting the several charters under which the  
mayor, burgesses, and commonalty of the city of *Bristol*,  
do now hold and exercise criminal and civil jurisdic-  
tion within the same city, &c. or as if the several powers  
and authority thereby given were herein repeated and  
applied to the said district, hereby united to and made  
a part of the said city, &c."

"Provided always, (section 18,) that nothing herein  
contained shall extend or be construed to extend to  
the making any alteration within the district so ex-  
empted and separated from the county of *Gloucester*,  
and added to the city of *Bristol*, touching any tax, rate,  
levy, or assessment whatsoever, now or hereafter to be  
raised in the said parish of *Clifton*, or to the charging  
the said district with any tax, &c. usually raised within  
the said city of *Bristol*, or touching any matter rela-  
tive to any ecclesiastical, *parochial*, or manorial juris-  
diction or right whatsoever, &c."

And by the *Bristol dock act* (43 Geo. 3. c. 140. ss. 65  
and 66,) the *Hotwell Road*, in the parish of *Clifton*,  
was also made a part of the city of *Bristol*, in the  
like terms, and subject to the same exceptions as were  
contained in the former act.

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The 5 Geo. 4. c. lxxix. enacts (s. 1), that the churchwardens and surveyors of the highways of the said parish of *Clifton* for the time being, together with certain persons therein named, shall be commissioners for lighting and watching the parish of *Clifton*, in the county of *Gloucester*, and for carrying that act into execution.

By section 6 commissioners are to be inhabitants and occupiers of lands, &c. within the parish of *Clifton*, of the annual value therein mentioned, and are to take an oath to that effect.

Section 17 regulates the appointment of officers by the commissioners, and the security to be given by them &c., and enacts, that if any such officer shall refuse or neglect to deliver up his accounts to the commissioners after such notice as therein mentioned, on complaint of such neglect or refusal to any justice of the peace for the county, city, town corporate, or place wherein such officer shall reside or be, such justice may bring the party before him by warrant, and hear and determine the matter in a summary way.

Sections 23 and 24 empower any justice of the peace for the county of *Gloucester*, to apprehend by warrant, and commit to the county gaol or house of correction, or to fine, persons wilfully or negligently breaking lamps, &c.

Sections 27 and 28 contain other provisions for the recovery of penalties before a justice or justices of the county of *Gloucester*.

By sections 33 and 34, constables, watchmen, &c. appointed under the act, are to be sworn in before a justice for the said county, and such justice may commit them, for neglect of duty or misconduct, to the county gaol or house of correction.

By section 39 the commissioners are authorized to raise money for carrying into effect the powers of the

at by a rate or rates to be made, assessed, charged, and levied, under the name and description of "the *Clifton* lighting and watching rate," on all houses situate within the said parish of *Clifton*, in manner therein mentioned; and in case of refusal to pay any of the said rates when due, after demand, the same are to be levied and recovered by distress and sale of the goods and chattels of the party in default, by warrant under the hand and seal, or hands and seals, of any one or more justice or justices of the peace acting for the said county of *Gloucester*, such defaulter having been first summoned as therein mentioned; and in default of such distress, such justice or justices may commit the defaulter to the county gaol, or house of correction, for a period not exceeding six months, or until payment.

By section 44, in case any person rated shall quit his house, &c., wherein any rate shall be made before having paid such rate, and shall afterwards refuse to pay the same when demanded, any one or more justices of the said county may grant a warrant of distress against such defaulter, authorizing any constable of any parish or town within the said county, to distrain and sell the goods of such person, such warrant being countersigned or backed by some justice or magistrate for the county, city, or liberty, wherein the said person shall then reside, or such goods shall be found; and gives the same power of commitment, in default of distress, as is contained in sect. 39.

Section 53 provides for the recovery of all other penalties and forfeitures incurred under the act before the justices of the county.

By section 57 an appeal is given to parties aggrieved by any rate or assessment, or order or judgment of the commissioners, or order or determination of any justice or justices, in pursuance of the act, to the general or

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quarter-sessions of the peace to be holden *for the county or place where the cause of appeal shall arise.*

Section 68 provides, that in any appeal from the rates or assessments, the justices at the general quarter sessions *for the said county of Gloucester* may amend without quashing the same.

The learned judge being of opinion that the jurisdiction of the county justices was preserved by the proviso in the 16 Geo. 3. c. 33. s. 18. and that the defendant was protected by the warrant, nonsuited the plaintiff, giving him leave to move to enter a verdict for 1s. *Bompas* Serjt. having in *Michaelmas* term obtained a rule nisi to enter a verdict accordingly,

*Erle* and *Crowder* showed cause in the present term and *Bompas* Serjt. and *Ball* were heard in support of the rule, before *Parke*, *Bolland*, *Alderson*, and *Gang* Bs. (a)

The Court took time to consider, and on a subsequent day the judgment of the Court was delivered by

PARKE B.—The only question which was reserved for our consideration in this case was, whether a justice of the peace for the county of *Gloucester* had jurisdiction to levy upon the plaintiff a rate imposed upon him by the commissioners for lighting and watching the parish of *Clifton*, under the powers of the 5 Geo. 4 c. lxxix. in respect of buildings occupied by him in the part of the parish which is in the county of the city of *Bristol*, and abutting upon streets or ways lighted and watched under that act. This was the main point in the cause; the others were disposed of in the argument. This question depends entirely upon the construction of that act: at the time it passed, by far the greater

(a) The question being only of local importance, the arguments of counsel have been omitted.

part of the parish of *Clifton* was in the county of *Gloucester*, two small portions having been separated from the rest, and annexed, by virtue of two acts of parliament, the 16 Geo. 3. c. 33. ss. 17, 18. and 43 Geo. 3. c. 140. ss. 65, 66. to the county of the city of *Bristol*, except (among other things) touching any tax, rate, levy, or assessment, then or thereafter to be raised in the parish of *Clifton*, or touching any ecclesiastical, parochial, or manorial jurisdiction or right. These exceptions had the effect of continuing the separate portions in the county of *Gloucester*, for the purpose of levying the king's taxes, county rate, poor rate, and church rate, but they could not have any effect in preventing parliament from dealing as it might think fit, by subsequent acts, with the whole parish, and establishing a new rate for a special purpose in the part only which is in the county of *Gloucester*; they can only assist us in the construction of such subsequent acts, if ambiguous words are used.

What, then, was the meaning of the legislature to be collected from the whole purview of the 5 Geo. 4.? Unfortunately, it has not expressed itself distinctly on this subject. Ambiguous words have been used in the title and preamble, which may apply either to the whole parish of *Clifton*, part of which is in the county of *Gloucester*, or to *that part* of the parish which is in that county; and which of the two was intended is to be collected from the context, and from a due consideration of the inconveniences which would attend each construction. The arguments to be derived from the other clauses of the statute appear to us to be unfavourable to the former interpretation of the act; for the jurisdiction for offences committed in the district lighted and watched, is given by several sections (23, 24, 27, 28, 32, 33, 34, 39, 51, 53, 58,) to justices of the county of *Gloucester* alone, and it is not to be supposed

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that the legislature intended to give them jurisdiction out of their proper county. The form of oath in the 6th section is the only circumstance in the act which indicates an intention to include the whole within the act; and if we refer to the inconvenience which might occur from conflicting jurisdictions—*Gloucestershire* magistrates are to have a special current authority in the part of the parish in common with those of that city—many of which inconveniences were forcibly stated on the argument—and conclude that the only evil of the opposite construction is, that commissioners cannot light and watch the whole question, or that added to *Bristol* by the second section if they should think proper to do so; we think most likely to construe the act correctly by concluding that the provisions of the statute apply only to the *Gloucestershire* part of the parish.

The exceptions in the former acts (the 16 and 43 *Geo. 3.*) afford us no ground for coming to a different conclusion; for although by them the same part is continued to be annexed to *Gloucestershire* for the collection of the king's taxes and parochial rates, the powers of this act, and the rates thereby imposed on particular portions of the parish which the commissioners may choose to light and watch, and which are benefited thereby.

We therefore think that the plaintiff is entitled to recover, and the rule must be made absolute.

Rule absolute.

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QUIGGIN *against* DUFF.

CASE. The declaration stated, that the plaintiff on &c., caused to be delivered to the defendant two boxes of types, to be by the defendant safely and securely kept and taken care of, and shipped to a certain place called *Douglas* for the plaintiff, for reward to the defendant in that behalf—that the defendant accepted of the said goods for the purpose aforesaid. Yet the defendant not regarding his duty &c. by himself and his servants, conducted himself so carelessly, &c. in and about the keeping and taking care and shipping of the said goods, that by and through the mere carelessness, &c. of the defendant, the said goods became and were wholly lost to the plaintiff.

Pleas: first, that the plaintiff did not cause to be delivered to the defendant the goods, nor did the defendant accept or receive the same for the purpose in the declaration mentioned, or for any other purpose. Secondly, not guilty.

At the trial before Lord Abinger C. B. at the last *Liverpool* summer assizes, the following facts were proved in evidence.

The two boxes of types, being of the value of about 36*l.*, were forwarded from *London* on the 6th *March* 1835, by one of the canal boats of *Kenworthy & Co.*, carriers to *Liverpool*, each addressed to “Mr. John Quiggin, *Douglas*, care of Mr. James Duff, *Brunswick Street, Liverpool*,” and were discharged at the *Duke of Bridgewater’s Wharf, Liverpool*, upon the 12th. They were seen by the porter, who landed them, lying

Goods were forwarded from *London* by K., a carrier, directed to the plaintiff at *Douglas* in the *Isle of Man*, “care of D. (the defendant) *Brunswick Street, Liverpool*.” The goods were landed at a public wharf in *Liverpool* by K., who on the same day sent a notice of their arrival to the defendant, and the latter, at the time the notice was delivered, signed an acknowledgment that the goods in question had arrived for the plaintiff. The defendant also entered them in the clearance and manifest of a vessel about to sail for the *Isle of Man*, but never sent for them until the sixth day after their arrival, when they were not to be found.

that on former occasions when K. had brought goods consigned to the defendant, he had desired them to be left on the wharf until he sent for them.

Held, in an action on the case against the defendant for not taking proper care of the goods in question, that there was evidence to go to the jury of a delivery to and acceptance by him of such goods.

It was proved the defendant,

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on the wharf for several days. On the fourth day, owing to the rain and to people treading upon the portions of the directions were effaced. The boxes were covered at night. No one came to inquire after them till about the sixth day after their arrival, when they were not to be found. On the day when the goods were landed, notice of their arrival had been delivered by *Kenworthy & Co.* at the defendant's office, and a clerk in his employment signed a receipt acknowledgment (dated at "6 o'clock p.m.") in the carrier's book, that the goods had arrived for the plaintiff. It was stated by the agent and warehouseman of *Kenworthy & Co.* that they had frequently received notices from the defendant on former occasions, when goods had arrived consigned to his care, not to send them to his office, but to let them remain on the wharf. The clearance of the steam-boat to the *Isle of Man* of the 18th of *March*, and also the manifest, both made out by the defendant's clerk, and containing the name of the plaintiff as consignee of the boxes of type, were put in and proved. To the manifest a memorandum was affixed, stating that the boxes were not sent, not having been found on the wharf. Upon this evidence, the lord chief baron was of opinion that the plaintiff must be nonsuited, as he could not support the averment in the declaration, that the goods were delivered to and accepted by the defendant; that if the defendant was guilty of negligence, was in not receiving the goods into his possession; and that the case would have been different had there been a contract that the defendant should send for the goods. *Alexander* for the plaintiff applied to his lordship to amend the declaration; which being refused, he urged that there was a sufficient case to go to the jury as to whether there had been a delivery or not. The lord chief baron intimating, however, that he should



direct the jury to find for the defendant, the plaintiff elected to be nonsuited.

In *Michaelmas* term, *Alexander* having obtained a rule nisi for a new trial, on the ground that the question ought not to have been left to the jury, whether the defendant had not by his acts admitted the receipt of the goods,

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*Cresswell*, and *Crompton* now showed cause. It is submitted that this nonsuit was right, for the plaintiff did not make out either the contract or the breach alleged in the declaration by which he bound himself to prove both a delivery of the goods and an actual acceptance by the defendant. None of the goods, however, came into the defendant's possession, and the case attempted to be established at the trial, was merely a constructive bailment. The question is, whether the delivery of the goods on a public wharf, was a delivery to and acceptance by the defendant. [*Parks B.* Coupled with the entry in the book.] The signature in the book acknowledging the goods to have arrived, is not sufficient to show an acceptance, although it may raise an implied promise to send for the goods and ship them. In *Selway v. Holloway (a)*, it was decided, that leaving goods at an inn from whence a carrier sets out, is not a delivery to the carrier. If this defendant had been the owner of a steam-boat sailing from the wharf, the delivery of the goods upon such wharf would not, according to that authority, have been a delivery to him. Supposing the notice from *Kemoorthy* to make the delivery, and the signing of his book to be the acceptance, the goods were then in the possession of the defendant, and he would have been liable for them, even although they

(a) 1 Ld. Raym. 46.

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had been taken away before he could by any possibility send for them. So, *Kenworthy* would have been justified in abandoning the goods before they could be removed by the defendant. In truth, however, the signing of the book amounts to nothing, for "all carriers are bound to give notice of the arrival of goods to the persons to whom they are consigned, whether bound to deliver or not;" *per Gould J., Golden v. Manning* (a); and if bound to give such notice, it was only reasonable for him to take an acknowledgment that the notice had been given. It is submitted that the giving of the notice was not a delivery, still less an acceptance; neither was signing the book an acceptance. [Lord Abinger C. B. Does not the question stand on higher ground? Here a party, knowing the business of the defendant, sends goods directed to the *Isle of Man*, and if he does not enter into a contract with the defendant, the goods must take their chance and remain on the wharf until the vessel arrives.] The entry in the book cannot be considered as a receipt, it is not so in form; at most it is only an acknowledgment of the receipt of the notice. [*Parke B.* Let us look at the duty of the carrier. It is not terminated until he delivers the goods to somebody else. That brings us to the difficulty I feel; namely, what was the object in signing the book?] The signing of the book does not strengthen the case, for suppose the party had brought the book late at night, and the defendant had signed it, but could not send for the goods until the next day, would that have been a delivery? Can it be assumed that from the moment the defendant signed the book he acknowledged the goods to be in his possession, and would be responsible for them? By signing the book the defendant has not estopped himself from saying,

(a) 2 W. Bl. 916.

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that he has never received the goods, for to do so he must use distinct and intelligible words, and it is unreasonable to infer that by signing it he intended to bind himself. [*Parke B.* The whole case turns upon the meaning of the receipt. Supposing that it operated as a discharge of the carrier, that the defendant had said expressly in it, he acknowledged the receipt of the goods and discharged the carrier, could he afterwards seek to avoid the effect of such an admission? The effect of this document, and whether it was to exonerate the carrier, should have been left to the jury.] It might be an acknowledgment to take charge of the goods when the steam-boat was ready to sail, but it cannot be put on higher ground. The question is, whether the duty of *Kemworthy* was ended or not. The defendant had no means of knowing what his duty was, or what was the contract between him and the plaintiff, which the latter might have shown. Assuming that it was his duty to deliver the goods, he did not perform it, for leaving them on an open wharf was not a delivery to the defendant, who was not there, and had no servants there to receive them. If I send a carrier with goods to deliver, he is responsible to me for their delivery, and no person by giving him a receipt can discharge his liability. [*Parke B.* Could not your agent exonerate him by giving a receipt for them?] It is submitted that he could not, for that would be a discharge from performance, and not an actual performance of duty. *Wardell v. Mourrillyan* (a) shows that a hoyman is not discharged from his liability by delivering goods to the wharfinger at whose wharf he is in the habit of plying. [*Parke B.* There the carrier's duty was to deliver them to some one else.] Here the defendant was known to be a shipping agent, and his duty was to

(a) 2 Esp. 693.

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see the goods forwarded, but he was not bound to take them into his possession in the meantime. He has merely a notice of their arrival, and they are not placed with him, or in any warehouse belonging to him. The goods are left on the wharf, and up to that time there is no contract by the defendant to take them into his possession. *Kenworthy* had not then discharged his duty, which was to deliver them to the defendant, and that never was done. [*Parke B.* Suppose the goods had been consigned to the defendant to be shipped for *South America*, and there would be no ship for six weeks, what would have been his duty in that case? Look at the position of the plaintiff, if he is to have his goods left on a wharf or in the streets of *Liverpool*, and no person responsible for them. If the defendant had no warehouse of his own, he would have a right to hire one, and charge the plaintiff with taking care of the goods in the meantime.] Assuming that it was *Kenworthy's* duty to deliver the goods, and the defendant's duty to take possession of them, they were neither delivered nor accepted; for it cannot be said that goods are delivered by placing them on a public wharf, and giving a notice of their arrival. *Kenworthy*, it is clear, had not done enough; he had to discharge himself from liability by his own act; for the defendant was not the agent of the plaintiff to discharge him from any part of his duty. Again, suppose *Kenworthy* was the plaintiff's agent to contract with the defendant, what agreement did he make?

Even supposing *Kenworthy's* duty ended, it does not necessarily follow that the defendant's had commenced, for that must depend upon the contract. The plaintiff should have sent word to the defendant, directing him to take charge of the goods; otherwise his duty was only to forward when the proper time had arrived. [*Parke B.* It is difficult to say, that no one

to be responsible for the goods. If *Kenworthy's* duty was terminated, the duty of some one else must have commenced, otherwise in what a condition would the owner of the goods be placed. *Bolland B.* If the carrier's duty had ended and the defendant's had not begun, there may be a question on the evidence of the master, whether the owners of the Duke's wharf were not liable.] But even if the defendant's duty commenced when *Kenworthy's* ended, it does not follow that the duty of the former would be that charged in his declaration. It might be his duty to take possession of the goods at a subsequent time, but not to do any thing which, coupled with the acts proved, will amount to the constructive delivery attempted to be established at the trial.

*Alexander* (Counsel with him) in support of the rule. It is submitted that the ground of this nonsuit was erroneous, namely, that the action was misconceived, and if the defendant was liable at all, that the declaration should have been for not accepting the goods. *Schoy v. Holloway* does not bear upon the present case. It might have applied if there had been nothing here but a delivery on the wharf, unaccompanied by a notice and receipt. The other cases which have been cited are equally inapplicable. It is clear upon the facts, that the plaintiff was entitled to recover. It may be admitted that the delivery on the wharf and the notice from *Kenworthy* would not have made him liable; but the signing of the receipt and the entry in the clearance manifest, clearly amount to a delivery to and acceptance by him of the goods. It was proved that on former occasions the defendant had given *Kenworthy* notice to allow the goods to remain on the wharf until he sent for them, and the reason why he shed them to lie there was, it saved him warehouse

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rent, cartage and portage. It is said that the book was signed merely to have proof of the notice, but that might have been furnished by the person by whom it was served. The reason of such signature obviously was, that the carrier might be relieved from responsibility, and if it had been refused he would have immediately sent the goods to the defendant's office. With respect to the clerk attending there by whom it was signed, he clearly was an accredited agent of the defendant. The signature was undoubtedly an admission of the receipt of the goods, and it is not afterwards open to the defendant to show that he has not received them, for otherwise the responsibility for the goods would be thrown upon the carrier. [The evidence of the warehouseman of *Kenworthy* having been read from the lord chief baron's notes, *Alexander* was stopped by the Court.]

LORD ABINGER C. B.—You have drawn my attention to a thing which had not struck me before as material. It appears from this evidence that *Kenworthy* had received notices from the defendant not to bring him goods consigned to him, but to leave them at the wharf until he sent for them. I still adhere to my opinion, that there was nothing in the contract between the parties which implied that the defendant was bound to accept the goods. But if he does receive goods he must take them with all their responsibility. I think that the fact of his having desired *Kenworthy* on former occasions not to send goods to him, should have gone to the jury on the question, whether, inasmuch as by the notices he had given to *Kenworthy*, he had in this particular instance made the wharf his own for accepting the goods, he had not accepted them. If that were so, then another question would arise, whether the wharf

was a proper place, and the defendant in leaving them there took due care of the goods. I therefore think that there must be a new trial.

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PARKE B.—I am of the same opinion. It is a question for the jury whether by the receipt the defendant meant to discharge *Kenworthy* from all liability on account of the goods, for if so he became responsible for them. Then the question will be, whether in leaving them on the wharf he took due care of them, for it was his business to see that they were deposited in a proper place. If they were not so deposited he must be answerable. The whole case seems to me to rest on what was the effect of the receipt. If the jury are of opinion that the defendant thereby intended to take the charge of the goods upon himself, and to discharge *Kenworthy*, then the next question is, whether he was guilty of negligence in not taking proper care of the goods.

BOLLAND B.—I am also of opinion that there must be a new trial. At first the only question seemed to me to be the effect of the receipt, and throughout the argument, and until the notes of the lord chief baron relative to the notices given by the defendant to the carrier were read, I thought that a question ought to have been left to the jury upon the evidence of the porter of the wharf, whether he had not the care of the goods, and it was not his duty to cover and make them secure. It appeared to me that hardly enough had been done on the part of the plaintiff to show that the effect of the receipt was to bind the defendant. But the evidence which has been referred to, shows that *Kenworthy* in former transactions had been told by the defendant not to bring goods to his office, but to leave them on the

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wharf. That fact is clearly an exoneration of *Kearworthy*, after notice given to the defendant and an explanation of the receipt, and no longer leaves it in doubt but that the matter was a question for the jury.

GURNEY B. concurred.

Rule absolute (a).

(a) The cause was again tried at the *Liverpool* spring assizes, 1836, before *Parks* B., when the plaintiff recovered a verdict.

ADAMS against MARY ANN BINGLEY, Administratrix of  
RICHARD BINGLEY deceased.

In February 1829, A. & B. being in partnership as brewers, B. advanced 300*l.* to D. out of the funds of the firm, and took his promissory note for the amount, payable on demand to the

ASSUMPSIT on a promissory note for 300*l.*, dated the 10th of February 1829, made by *Richard Bingley* deceased, payable on demand to the order of *George Wyatt*, for value received, by him indorsed to Messrs. *George Wyatt* and *Henry Thompson*, and by them to the plaintiff: counts for interest, and on an account stated.

First plea, as to the first count, that after the making of the said note, and of the said indorsements thereon,

In November following C. purchased the interest of A., and the business was from that period carried on by B. & C., and a notice of the change in the firm was at the time inserted in the *Gazette*, signed by A. B. & C.; and persons indebted to the firm were directed to pay their debts to B. & C.

In August 1831, B. represented to D. that the firm wished for a fresh security, and obtained from him his acceptance for 300*l.* in substitution for the note which B. undertook to get from A. and deliver up, but which was not done.

In April 1831, the note was indorsed by B. to B. & C., and by them to A. as security for advances made by him. In December 1831, B. & C. became bankrupt. In June 1832, D. paid A.'s attorney the amount of the bill of exchange. In 1835 A. brought an action against D.'s representative on the promissory note.

Held, that A. was entitled to recover, unless the jury could infer that under the circumstances he must have known that the bill of exchange was given for the same debt as in the note.



the said *Wyatt* and *Thompson*, as the agents of the plaintiff, and on his behalf, to wit, on the 19th of August 1831, obtained and procured from the said *R. Bingley*, in his lifetime, a bill of exchange for 300*l.*, accepted by him, and payable three months after date, in lieu of and in substitution for the said promissory note in the declaration mentioned: that the said *R. Bingley* afterwards, and after the said bill of exchange came due and payable, to wit, on the 8th of June 1832, paid to the plaintiff the said sum of 300*l.* in the said bill of exchange mentioned, together with 7*l.* 10*s.* for interest thereon, in full satisfaction and discharge for the said promissory note in the declaration mentioned. Verification. Second plea, *non assumpsit* to the residue of the declaration.

Replication to the first plea, that the said *Wyatt* and *Thompson* were not the agents, nor was either of them an agent of the plaintiff, nor had they or either of them any authority whatsoever from the plaintiff to obtain or procure or accept from the said *R. Bingley* the said bill of exchange in the plea mentioned, in lieu of or in substitution for the said bill of exchange in the declaration mentioned; upon which issue was joined.

At the trial before Lord *Abinger* C. B. at the sittings at *London* after last *Trinity* term, his lordship held, that upon the above pleadings the defendant was entitled to begin. The following were the facts of the case.

*Henry Wyatt*, for some years previous to his death, which took place in *July* 1826, carried on business in partnership with his two sons, *George Wyatt* and *Henry Wyly Wyatt*, as brewers, in *Portpool Lane*. By his will he appointed the plaintiff and one *Edmund Marks* executors, to whom he bequeathed his surplus proprietary capital invested in his business, with directions for them to carry on and manage such business in

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" Notice is hereby given, that the partnership formerly subsisting between *Henry Wyatt* (the deceased,) and his two sons, *Henry Early* & *George Wyatt*, of *Portpool Lane, Gray's* brewers, under the firm of *Wyatt and Sons* partnership carried on since his death by us signed, have been dissolved by mutual consent from the first day of this instant *January*, so far as said *H. E. Wyatt*, who retires from the business, and all persons indebted to either of the said firm, shall pay their debts to the said *George Wyatt*, and all due from the said firm shall be paid by the said *George Wyatt*. As witness our hands, this 1st day of *January*, 1828.

" *Henry Early Wyatt*.

" *George Wyatt*.

" *Edmund Marks*, ) " Executors of

" *Samuel Adams*, ) *Wyatt deceased*

From this period the business was carried on by *George Wyatt*, with the concurrence of the said *Henry Early* & *George Wyatt*, under the firm of *George Wyatt & Co.*, until the 1st day of *November* 1829, when *Henry Thompson* purchased the interest of the testator, *Henry Wyatt*, and the executors, the following notice was published.

with the concurrence of the undersigned *Samuel Adams* and *E. Marks*, as executors named in the last will and testament of *Henry Wyatt* esq. deceased, on behalf of his son, *William Wyatt*, at the established brewhouse in *Portpool Lane, Gray's-Inn Lane, London*, under the name, style, and firm of *George Wyatt & Co.*, has this day ceased and determined; and that the same will in future be carried on by the said *George Wyatt* and the undersigned *Henry Thompson*, in copartnership, at the said brewhouse in *Portpool Lane*, aforesaid, under the name, style, and firm of *Wyatt and Thompson*. All persons indebted to the said concern are to pay their debts to the said Messrs. *Wyatt and Thompson*, and all persons having any claims or demands upon the said concern, are to send their respective accounts thereof to the said Messrs. *Wyatt and Thompson*. Dated this 6th day of *November 1829*.

“ *George Wyatt*.

“ *Samuel Adams*, )

“ *Edmund Marks*, )

“ *Henry Thompson*.”

“ Executors of *Henry Wyatt* deceased.

It appeared from the evidence of *George Wyatt*, who was called on the part of the defendant, that *Richard Bingley* was a publican at *Somers Town*, and a customer of the brewery, both prior and subsequent to the dissolution of partnership in 1828. The witness stated, that in *February 1829*, *Bingley* applied to him for a loan of 300*l.*, in order to enable him to open another public-house, which the witness advanced to him out of the money of the then firm, and received the promissory note in question as a security. The plaintiff was informed of the loan by the witness, who retained possession of the note until *August 1831*, when he gave it up to *Thompson*, who told him that the plaintiff was

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desirous of having the old security done away with, and a fresh note drawn on *Bingley*. Accordingly the witness *Wyatt* saw *Bingley*, and informed him that the firm wished to have a new note in lieu of the old one; to which *Bingley* agreed, and purchased a stamp, and accepted the bill set forth in the first plea. The witness, at the time the bill was drawn, told *Bingley* that the plaintiff would bring the old note to town with him on the following morning, and that *Thompson* would send it to him, and he gave *Bingley* a written undertaking to deliver it up. It appeared that the witness knew from *Thompson* that he had given the note to the plaintiff. On the part of the plaintiff, it was proved that he was a large creditor both of the firm of *Wyatt & Co.* and of *Wyatt and Thompson*; that in April 1831, *Wyatt and Thompson* were indebted to Messrs. *Barclay & Co.*, their bankers, in 5000*l.*, and applied to the plaintiff to become their surety for half that amount, on depositing with him a number of promissory notes belonging to the firm, which were then held by the bankers, and also several other notes in the hands of *Wyatt and Thompson*, including the note on which the present action was brought. The plaintiff acceded to the application, and drew bills on *Wyatt and Thompson* to the amount of 2500*l.*, which he indorsed to *Barclay & Co.* upon receiving the promissory notes before referred to, and among them the note in question, which *Wyatt and Thompson* indorsed to him, *Wyatt* having previously indorsed it over to himself and *Thompson*. In December 1831, *Wyatt and Thompson* were declared bankrupts, and the plaintiff proved debts to the amount of 27,000*l.* under the fiat. The plaintiff having applied to *Bingley* for payment of the note, the latter stated that he had been defrauded out of his acceptance, which he gave in lieu of the note, by *Wyatt and Thompson*, who represented themselves to him as the holders of

the note. The bill of exchange had been paid to the attorney for the plaintiff in 1832. In summing up, the lord chief baron told the jury, that the notice of dissolution of *November* 1829, authorized any person who was indebted to the firm to settle with *Wyatt* and *Thompson*; and that the plaintiff being a partner in the business when the promissory note was given, and having signed that notice, was bound by all the equities to which *Wyatt* and *Thompson* were liable, and made them his agents to receive the bill of exchange given in substitution for the note; and that the indorsement of the note by them to the plaintiff was a fraud on *Bingley*. The jury having found their verdict for the defendant, *Erle* in *Michaelmas* term obtained a rule *nisi* for a new trial, on the ground of misdirection.

*Bompas* Serjt. now showed cause. The defendant is entitled to retain her verdict. The notice of *January* 1828 shows, that the only change which then took place in the firm was the retirement of *Henry Early Wyatt*, and there is therefore no doubt that the plaintiff was a partner in 1829, when the loan was made. A note was given for the money, which was a mere loan to enable *Bingley* to extend his business, and was never intended to be considered in any other light; the note being only taken as a private security between the parties, and being never meant to be put into circulation. Though a third person, to whom the firm had indorsed it over, might have sued upon the note, yet as regards the original parties, it would be a fraud upon the understanding between them, that the plaintiff, one of those parties, should attempt to enforce it. The money lent was in truth the debt, the loan account between brewers and publicans being kept distinct from any other transaction, and the note was merely a voucher, such as is usually given in the course of business be-

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tween bankers and their customers. On the dissolution of the partnership, *Bingley* had notice to pay the debt owing from him to the firm to *Wyatt* and *Thompson*; the note remained unnoticed, and *Bingley* had no idea that it was different from any other debt. It is clear that, as regards this debt, the plaintiff and *Wyatt* were still partners, for a dissolution of partnership only has reference to future transactions. [*Parke* B. There is no doubt that they remained partners in the note until it was indorsed over.] Suppose a mortgage to a firm, which is assigned over to one partner, who gives notice that the debts are to be paid to the other, could he, after the mortgage money was paid to the other, enforce the mortgage? It makes no difference that here the security is negotiable. [*Parke* B. In my view of the case, it makes all the difference that this security was negotiable.] It was never intended to be negotiated. [*Parke* B. Then why was it made payable to order? I cannot get over that fact. The notice is only to pay such debts to *Wyatt* and *Thompson* as are partnership debts at the time of payment. Partnership debts are of two kinds,—the one assignable, the other not; of the former, a promissory note is capable of being assigned, and a third party may sue upon it. With respect to debts which are not assignable, the notice applies. It strikes me that an assignment of a note to one partner is good, unless it can be shown that it was done with a fraudulent purpose. Lord *Abinger* C. B. A mere assignment of the note to a third party would not be a fraud, provided notice was given to the maker.] The original parties to an accommodation note cannot sue upon it, although third persons may. In *Collins v. Martin* (a), it seems to have been admitted, that if one member of a banking firm indorses over bills deposited with the firm indorsed

(a) 1 B. &amp; P. 648.

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blank to his partner, you may inquire into his authority to do so. Here the plaintiff was a partner in the bill, and continued so up to the time it was indorsed; and the plaintiff in effect indorsed the note over himself. If the partnership in the debt was subsisting, then all the communications with *Wyatt* were communications with the plaintiff. *Wyatt* procured the acceptance from *Bingley* as the plaintiff's agent, and the plaintiff cannot afterwards avail himself of the bill obtained, and then disclaim the authority. [*Parke B.* Now can it be said that the plaintiff adopts the authority of *Wyatt* when he does not know that he obtained the bill? If he in fact gave *Wyatt* authority to exchange securities, there is an end of the case.] Even if the plaintiff did not give *Wyatt* authority, yet if the latter presented to *Bingley* and said he had such authority, and procured the bill, and the plaintiff takes advantage of it, he cannot afterwards say that *Wyatt* had no authority. [*Parke B.* If a man gives a valuable consideration for a bill, is he to be bound by what a party does at the time when the bill was obtained? and having obtained a negotiable security in his hand, can he be charged with any thing not previously notified to him? According to your argument, although the note was obtained by *Wyatt* without authority, yet, having got it under assumption of authority, the plaintiff, who receives it afterwards, takes it tainted with fraud, though he knows nothing of the way in which it was procured.] Being a partner he must be presumed to know the fact.

*Erle* and *Chandless* in support of the rule. The only question raised upon this issue is with respect to *Wyatt* and *Thompson's* authority to receive the substituted security. It is said that the loan was the debt between the parties, and that the note was nothing more than evidence of it, and that under the notice directing the

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debts to be paid to *Wyatt* and *Thompson*, the authority to receive the bill in lieu of the note. In the plea the note is admitted to be the separate property of the plaintiff, and the notice only extended to partnership debts; and consequently it gave them such authority. Even if that were not so, the means only that parties shall pay debts continuing to the partnership to *Wyatt* and *Thompson*. But if a party gives a promissory note for a debt, he makes it a negotiable instrument, and becomes liable to the incidents of such a security. Even if there had been an agreement here not to negotiate the note, it could not be set up, for that would be to admit parol evidence to impeach a written contract. *Bingley* having paid the money, should, as a prudent man, have taken care to obtain the note. There was no negligence on the part of the plaintiff, who, when he received the note in 1829, became insulated from the rest of the partnership. [Lord *Abinger* C. B. My difficulty is this:—the plaintiff was privy to the original transaction, and his privity does not cease by his taking an assignment of the note. Can he, by an arrangement with the partners, alter the relation of the debtor to the partnership? *Parke* B. You assume that all the partners could be sued upon the note, and that if so, the plaintiff could

*Cur. adv.*

A few days afterwards

LORD ABINGER C. B. said,—On consideration of the case I am not prepared to say that I was right in telling the jury that the indorsement to the plaintiff, and the notice given to pay the partnership debts to *Wyatt* and *Thompson*, was a fraud. If I had said it to them whether they could presume a fraud, I do not know that I should have been dis-



with the verdict. If the plaintiff was the *bonâ fide* indorsee of the note, there is no doubt he might sue upon it. But I think, at the same time, that it will be a question for the jury whether he was not aware of the substitution of the bill of exchange for the note, or ought not to have known it. The point put to the jury, that payment to one was payment to all, I think I cannot maintain. There must therefore be a new trial.

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PARKE B.—It appears to me that the plaintiff was the *bonâ fide* indorsee of the note; that there was no legal obligation on the brewers not to sue upon it, although they might be bound in honour not to do so; and that the plaintiff, who took it by indorsement for a valuable consideration after the dissolution of the partnership, cannot be in a different position to theirs; he was therefore a *bonâ fide* indorsee, and might also sue upon the note. The notice given on the dissolution of the partnership extended only to such debts as were partnership debts at the time, and under it *Wyatt* and *Thompson* had no power to receive this debt. It has occurred to some of the court, that there may be a question whether, as the precise amount of the note which was given, and which the plaintiff knew was given for the loan to *Bingley*, was afterwards received in a bill by *Wyatt* and *Thompson*, and was handed over by them to the plaintiff, he ought not to have inferred that the bill was given in exchange for the note. If he had reason to know from the similarity of the amount of both securities, and from the circumstances in which *Bingley* was placed, who had never repaid the money advanced on the note, that both were for the same debt, he had no right to sue upon the note. That point ought therefore to be submitted to the jury.

BOLLAND B. concurred.

Rule absolute.

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*BOWERS against EVANS and Another.*

In support of a plea of payment, the defendants proved the payment of 11*l.* to *H.*, the plaintiff's attorney, on the plaintiff's account. To rebut this evidence, the plaintiff proposed to call the attorney, to prove that the defendants who paid the money, afterwards came to him and got it back, but he was rejected as being incompetent, and the defendants recovered a verdict:  
Held, that the witness was competent, and his evidence should have been received.

**A**SSUMPSIT upon a promissory note for 12*l.* 15*s.*  
Plea: as to the sum of 1*l.* 15*s.* parcel*l* &c., a tender, and as to the sum of 11*l.*; the residue, payment: and issue thereon.

At the trial before the under-sheriff of *Carmarthenshire*, the note having been proved, the defendants called a witness, who stated that one of the defendants had paid *Howell*, the attorney for the plaintiff, 11*l.* on the plaintiff's account. To rebut this evidence, the plaintiff proposed to put *Howell* into the box, to prove that the defendant who paid the money subsequently came, when *Howell* was alone, and got it from him again. The under-sheriff however rejected *Howell* being of opinion that he was an incompetent witness and the defendants recovered a verdict.

*E. V. Williams* having on a former day in the present term obtained a rule nisi for a new trial, on the ground that *Howell* was improperly rejected;

*Chilton* now showed cause, and contended that the witness was properly rejected. It is laid down in *Phil. on Ev.* 62, and cases are cited to support the position, that an agent of one of the parties to the suit not a competent witness, if in case of the verdict being against the party for whom he is called, he would be liable to him for the costs of the action. Here, if a verdict had passed for the defendants, on the ground that the money had been paid, the witness would have been liable for the costs, on account of having suppressed the fact of the receipt of the money. Again, it is stated, that "a person who has received money due from the defendant to the plaintiff, is not a competent witness if

he defendant to prove that he received the money as agent for the plaintiff." The present case seems the converse of that, for the witness is to be called to disprove the payment—to suppress the fact, in order to rid himself of liability. [*Parks B.* How do you make out that he has suppressed the fact of the payment at all?] He must have suppressed it, for he brings an action for the money on account of his client, and has denied the plea of payment.

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*Lord Abinger C. B.*—Has it ever been decided, that you may not call an attorney to prove the receipt of money, because he might probably expose himself to an action for misconduct?

*Parks B.*—Your argument is, that the attorney would be liable to a special action on the case, but to support such an action the fact of suppression must be proved; upon this record he has only put the opposite party to proof of payment of the money. I am strongly inclined to think, even if the suppression was made out, that the objection to his competency is cured by the 26th section of the 3 & 4 *Will.* 4. c. 41., for the plaintiff, by calling him, has given him an implied release.

*BOLLAND and GURNEY Bb.* concurred.

Rule absolute.

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JOHNSON, Administrator of STAMFORD, *ag*  
HAMILTON.

A rule *nisi* having been granted to stay the *postea* in the hands of the associate, on the ground that the plaintiff had been lost at sea before the trial, the court, on cause being shown, discharged the rule, the affidavits on which it was obtained showing only a strong probability of the death of the plaintiff, but disclosing no fact that would be evidence before a jury.

*Semble*, that if the facts had been conclusive as to the death, the court would have made the rule absolute.

**WIGHTMAN** had obtained a rule in *Michaelmas* term last, in behalf of the defendant, to *postea* in the hands of the associate, with a stay in the meantime, upon the ground of having abated by the death of the plaintiff before trial (a).

*Alexander* (Crompton with him) showed cause in the present term. The evidence disclosed in the affidavits on which this rule was granted, does not satisfy the rule of law on which the presumption of death is made. If it had been shown that the plaintiff sailed many years ago, then a presumption of death would be raised. But the lapse of time in the present case is not sufficient for such a presumption. It does not necessarily follow, from the facts detailed in the affidavits on the other side, that the plaintiff is dead. For the fact that the ship from *Lloyd's* list is merely hearsay, adverse witnesses have prevented the ship arriving in *Africa*, and the cargo and spars may have been washed overboard. In such events, these facts were known to the defendant at the trial, and he should not be allowed to rely on them in defence now, which he did not then attempt to do.

*Wightman contra*. In questions of life and death, a presumption of the time of death must arise; and if the plaintiff is dead, he must have died before the trial. If the court see enough on the defendant's side to raise a presumption, which are unanswered by the other side, to induce a presumption of death.

(a) See a report of what passed when the rule was granted in *Michaelmas* term, *ante*, p. 45.

(b) 2 Stark. on Ev. 261.

think the plaintiff is dead, they will not drive the defendant to bring a writ of error ; and even if they are of opinion that the facts disclosed are not sufficient to warrant such a belief, at any rate it is submitted they ought to suspend the judgment until it can be ascertained whether he is dead or not. If thought necessary, the defendant will pay the amount recovered by the verdict into court.

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LORD ABINGER C. B.—I believe the court think it very probable that the plaintiff was lost, but a presumption is not sufficient, we ought to be able to draw a certain conclusion before we accede to this motion. The question is, whether you have laid before us a sufficient ground to satisfy us the plaintiff is dead, and we are of opinion you have not done so. Your affidavits do not disclose any fact that would be evidence before a jury, and only present a strong probability. If the facts were conclusive, there would be some reason to do that which is asked of us, in order to save expense to both parties. The defendant is seeking a suspension of the judgment, that by delay he may obtain the presumption of time against the judgment. We do not prevent the defendant from bringing a writ of error, but in a case where the evidence of death amounts only to a presumption, we will not give a party time in order to strengthen that presumption.

PARKE B.—All the facts contained in the defendant's affidavits were known to him at the trial, and the objection might then have been raised ; therefore such a defence as this is not to be favoured. He may now, if he thinks proper, bring a writ of error. The principal objection in granting the rule, was to afford the other side an opportunity of answering the affidavits, by showing that the plaintiff was alive. That they certainly have not

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done, but still I am of opinion that sufficient ground has not been laid for us to make the rule absolute. It must therefore be discharged, but without costs.

Rule discharged accordingly.

**BRIGHT against DURNELL.**

Two arbitrators were chosen in pursuance of a clause in a deed which directed that they should appoint an umpire before they commenced proceedings. They met, but could not agree upon an umpire, whereupon the plaintiff revoked his arbitrator's authority.

Held, that the case was not within the 3 & 4 W. 4. c. 42. s. 39., which applies only when there is a complete reference.

**CROWDER** had obtained a rule nisi to stay the proceedings in this cause, and for the plaintiff to pay the costs.

The following were the facts of the case as disclosed in the affidavits.

The plaintiff and defendant had entered into partnership as surgeons, and by the deed of copartnership it was provided, that if any dispute arose between them with respect to the partnership affairs, it should be referred to two arbitrators, one to be chosen by each, who were to appoint an umpire before they commenced proceedings, and that the cause of complaint should be reduced into writing. There was also a clause that the submission might be made, a rule of court. Disputes having arisen, the plaintiff wrote down various causes of complaint, stating, that the defendant by fraudulent misrepresentations had inveigled him into partnership. He then named an arbitrator, who having refused to act, he appointed another. The defendant named a referee on his part, and the two arbitrators had a meeting to appoint an umpire, but could not agree. The plaintiff thereupon revoked the authority given to his arbitrator, and arrested the defendant for 200*l.* had and received to his the plaintiff's use. An application was made by the defendant to *Alderson B.* at chambers, to cancel the bail-bond, on

the ground that the plaintiff's claim was in respect of partnership accounts which were unsettled, and also that the plaintiff could not revoke his authority. His lordship declined to interfere, but recommended an application to the court, who refused to set aside the bail-bond, but granted the rule on the second ground.

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Sir *W. W. Follett* showed cause, and *Crowder* was heard in support of the rule. The latter contended that the case was within the 3 & 4 *W. 4. c. 42. s. 39. (a)* which enacts, among other things, that the authority of an arbitrator or umpire appointed in pursuance of a submission, containing an agreement that such submission shall be made a rule of court, shall not be revocable by any party to such reference, but the arbiter or umpire shall and may proceed with the reference notwithstanding any such revocation.

LORD ABINGER C. B.—I am of opinion that this case is not within the act, which applies only where there is a complete submission. Here the submission has not been perfected.

PARKE B.—How can you compel these arbitrators to appoint a third, and until that is done what certainty have you that the reference will be proceeded with? What would be the consequence of staying the action? You cannot compel the arbitrators to go on, and it would be a denial of justice to the plaintiff if we were to prevent him from prosecuting his action without giving him any other remedy. If an umpire had been appointed within due time, the case would have been within the act, and you would then have had ground for the present application, as his authority could

(a). For the clause see *Potter v. Newman*, ante, 30; see also *Burley v. Stephens*, ante, 413.

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not have been revoked. Here you have not got a complete reference. The rule must be discharged, but without costs.

BOLLAND and GURNEY B. concurred,

Rule discharged accordingly.

IN THE EXCHEQUER CHAMBER.

WILLIAMS *against* GARDINER.

(In Error from the Court of Exchequer.)

[Before Lord DENMAN C. J., LITLEDALE, PATTERSON, and WILLIAMS, Justices of K. B.; J. A. PARK, GASELEE and BOSANQUET, Justices of C. P.]

One of the counts in an action of libel set out the following passage from a letter written by the defendant to a Mr. P.: "I have reason to suppose that many of the *flowers* of which I have been robbed, are growing upon your premises," (thereby meaning, that the plaintiff

THIS was a writ of error, brought upon the judgment of the court of Exchequer in the case of *Gardiner v. Williams* (a).

*Maule* for the plaintiff in error. There is no sufficient connection between the inducement and the letter which forms the subject of the libel. It is alleged, that the letter was published "of and concerning the plaintiff below, in his said business and employment as a gardener." The letter refers to the conduct of the plaintiff below, as the gardener of Mr. *Williams*, but there is no inducement that he had been gardener to that gen-

(a) 5 Tyr. 757.


had been guilty of larceny, and had stolen from the defendant certain *plants, roots, and flowers* of the defendant, and had disposed of them unlawfully to P., and unlawfully placed them in P.'s garden.) The former part of the letter stated, that the plaintiff, who P. had then in his employment as a gardener, had been discharged from the service of a Mrs. N. and the defendant for dishonesty:

Held, on error, that the innuendo referred to the whole passage of the letter and not to particular words, and that it was not too large.



man; which there ought to have been, but only a statement that he had been gardener to Mrs. *Nicholls* and Mr. *Pierce*. In *Sellers v. Till* (a), where the plaintiff alleged, that words were spoken of him as treasurer and collector of certain tolls, it was held, that he was bound to prove he was both treasurer *and* collector.

The chief objection, however, is, that the innuendo that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant's, and had disposed of them lawfully to *Pierce*, and unlawfully placed them in a garden of the latter, is too large. By that innuendo the words of the libel are enlarged, and a sense given to them beyond their natural meaning. Where words are used in a larger sense than is generally given to them, it is necessary that there should be an inducement to show the court that the words must have been used in that sense. Here the words of the libel merely are, "I have reason to suppose that many of the flowers I have been robbed of, are growing upon your (*Pierce's*) premises." There is no introductory averment, that the defendant below had been robbed of "plants, roots, and flowers," or any thing to show that the words must have had the meaning imputed to them. *Goldstein v. Brown* (b) establishes, that some such introductory averment was necessary, and that decision is conformable with the older authorities. Thus in *Barham's* case (c), where the words were "Master *Barham* did burn my barn," and the innuendo was, a barn full of corn, the judgment was arrested, because there was no inducement to support the enlarged sense which the innuendo had given to the libel. So also, in *Thomas v. Arntz* (d), where the words were, "he hath forged this

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(a) 4 B. & C. 655; 7 D. & R. 121.

(b) 4 Bing. 409; 1 M. & P. 402.

(c) 4 Co. Rep. 20.

(d) Hob. Rep. 2.

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warrant," innuendo, the warrant of a certain sheriff on a *capias* which was set out, the judgment was arrested, on the ground that the word 'warrant' alone has an uncertain meaning. So in *Miles v. Jacob* (a), the libel charged was, "thou hast poisoned *Smith*," innuendo, a certain *Samuel Smith* then dead, the declaration was held bad, from not containing an averment that *Smith* was dead. The law then and still is, that an innuendo is not an allegation, but a simple explanation of the words used.

The same argument applies to the word 'flowers,' which in the innuendo is expanded into plants, roots, and flowers. Even allowing the word 'flowers' ordinarily to comprise roots and plants, yet when it is said that by the word 'flowers' is intended plants, roots, and flowers, that enlarges the sense of the word 'flowers'; for in that case plants and roots must mean something more than flowers. Supposing the jury to have been of that opinion, they would be bound to give greater damages for a word used in that enlarged sense; and it must now be assumed, that they did give damages for an imputation of stealing plants, roots, and flowers. [*Williams J.* There may be a valuable plant which is not a flower; therefore the word 'flower' does not necessarily mean a plant. Lord *Denman*, The word 'flower' may mean a flower plucked from the stalk, or it may mean a root or plant. *Patteson J.* The libel says that the flowers are growing, therefore here the word cannot mean the heads of flowers.] It is submitted that the libel itself cannot be called in aid to supply the want of an inducement. Notwithstanding a party may be called an attorney in a libel, it is still necessary to have an allegation that he is one, although it may not be requisite to prove him so. There is nothing whatever in this declaration to show that the libel imputed to the plaintiff larceny i

stealing plants, roots, and flowers, and consequently the meaning of the words is greatly enlarged by the innuendo in which a sense is given to them, which they will not naturally bear.

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*Thesiger contrâ.* With respect to the first objection, the libel itself states, that the plaintiff below was the gardener of the defendant. [Lord *Denman* C.J. We have no doubt on that point.] With reference to the innuendo, supposing it were rejected, there is no doubt the letter would be libellous. The cases of *Roberts v. Camden* (a) and *Harvey v. French* (b) show that an innuendo, which introduces new matter without any antecedent colloquium to support it, may be rejected as surplusage. An innuendo is only necessary either where, as in the cases cited from *Hobart*, the words in themselves are uncertain, or where it is requisite to show that an indictable offence is imputed, as in *Barham's* case. For instance, in *Miles v. Jacob* the words required an innuendo to explain them, which could not be introduced without an averment showing the occasion on which they were uttered. So in *Barham's* case, the words were not actionable without an innuendo to explain them. *Day v. Robinson* (c) may be distinguished. The words spoken there were, "You have robbed me of one shilling tan-money," which by the innuendo was explained to mean that the plaintiff had fraudulently taken and applied to his own use a shilling received by him for the defendant, the produce of some tan sold by the plaintiff for the defendant, as his servant, and the innuendo was held bad, as introducing new facts without any introductory averment. That, however, was a case of slander, and the words were not ac-

(a) 9 East, 93.

(b) 2 Tyr. 585.

(c) 1 Ad. & El. 684; 4 Nev. & M. 684.


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tionable in themselves; here the words are written, and are clearly actionable. It is therefore immaterial whether the innuendo is good or not, for if bad it may be rejected. It is submitted, however, that it is good. It is said, that if an innuendo may possibly convey something more than the libel meant, it is bad. It is apprehended, on a motion in arrest of judgment, that any state of circumstances can be supposed which will support the innuendo, it will be held sufficient. But the libel alleges that the flowers are growing, and if they must have roots, and must be plants, which is the generic term for any flowering production; so that the whole of the innuendo may be applicable to the fact which must be taken to have been proved at the trial. It might, if it were necessary, be shown that the word 'flower' is, in numberless instances, used by standard writers to signify a growing plant.

*Mauls* in reply. In the way in which the word 'flowers' is introduced in this innuendo, it must mean something more than roots and plants. It is said, that an innuendo may be rejected, and two cases have been cited to establish that proposition. But *Robertson v. Camden* does not apply; for there the innuendo was rejected, because it did not qualify the meaning of the libel; here it is aggravatory of the libellous matter. In a trial for libel, the proper way to leave the case to the jury is to ask them if they think the words were used in the sense imputed to them in the innuendo. It is a very unsound rule to reject such an innuendo at the present, and for the court to give judgment on one part of the declaration when the jury have given damages for the whole. At the trial damages were recovered in respect of the words in the libel, and if so it must have been in respect of some sense in which they were used, and the sense ascribed to them would be that alle-

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in the innuendo. There is no case in which an innuendo like the present has been rejected. In *Harvey v. French* there was not, properly speaking, any innuendo; it was a mere statement of the intention with which the libel was published. [*Patteson J.* That is the very thing that has struck me here. This is not an innuendo as to the word, 'flowers,' but it is an explanation of the whole sentence.] It does not state the intention of the party, which is the distinction in *Harvey v. French*. In *Day v. Robinson*, *Tindal C. J.* distinctly limits the doctrine of rejecting an innuendo, not to a case where it may be taken away, and words be still left which are actionable, but to one where the innuendo does not vary the charge. He, therefore, infers that it cannot be rejected where it does enlarge the sense of the words. It is said, that if the court can imagine any state of circumstances which will support the innuendo they will do so, but that is directly at variance with the principle, that there must be sufficient in the declaration to enable the court to see that the words were used in the sense imputed to them, and all the authorities show that the want of necessary introductory averments is not cured by verdict. Words are to be understood in their ordinary sense, not merely by themselves but in combination; and a person using the words "plants, roots, and flowers," must be supposed to mean something more than flowers.

*Lord DENMAN C. J.*—We are of opinion that this judgment must be affirmed; not, however, on the ground that the word 'flowers,' standing alone, may be taken to mean plants, roots, and flowers, but on the ground that the innuendo evidently refers to the whole passage, and not to particular words, and that the whole passage clearly bears the sense ascribed to it by the innuendo. It obviously means that the defendant has been robbed, and

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that flowers capable of being planted (that is to say, having roots), have been stolen from him by the plaintiff, and are growing in *Pierce's* garden. We think that by our decision we are not introducing any innovation, but rather abiding by the authorities which have been cited by Mr. *Maule*.

Judgment affirmed.

The ATTORNEY-GENERAL *against* NASH and Others.

A testator by his will directed his executors to invest the residue of his personal estate in the funds, and divide the interest "among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they should see fit."

Held, that the executors could not be called upon to pay legacy duty in respect of such residue.

THIS was an information against the defendants, who were the executors of the will of *John Wilkinson*, deceased, for legacy duties alleged to be payable in respect of the residuary bequest therein made of his personal estate. The object in filing the information being to obtain a review of the decision in the case *In re Wilkinson* (a), a special verdict was taken, setting out the will, and judgment was entered by consent for the defendants in the court of Exchequer, upon which a writ of error was brought.

The clause on which the question arose was as follows: "Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in bankers' hands, bills of exchange, &c. &c. be collected into cash, and laid out in the funds in the bank of *England*, and that my executors hereafter named, and their heirs and assigns, do receive the interest thereof at the bank, half-yearly, and divide it among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they see fit, not omitting large or sick families, if of good character." The testator's son was one of the executors.

The points marked for argument on behalf of the crown were,

(a) 4 Tyr. 513.

That the entire sum bequeathed to the charitable objects in the legacy, and not the smaller parts into which it is to be divided for the purpose of distribution.

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That either the executors are the legatees, and that the persons receiving the bounty do not take as legatees under the will, but by the gift of the executors; or,

That the legacy is to be construed as a legacy to poor pious persons as a class.

On the part of the defendants, the points were—

That the legacy duty attaches upon beneficial interests only.

That no party taking beneficially under this bequest has an interest to the amount of 20*l.*, and that consequently no legacy duty is payable in respect thereof.

*Amos* for the crown. The question depends upon the construction to be put on the residuary clause in the will, taken in connection with the 55 Geo. 3. c. 184. schedule, part 3. The statute directs, that “for every legacy specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will, or testamentary instrument of any person who shall have died after the 5th day of April 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged, after the 31st day of August 1815; also, for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who shall have died after the 5th day of April 1805, (after deducting debts, &c. first payable

... sanguinity, or to a stranger in blood, is 10 per cent. of the amount bequeathed. This duty is in legacies generally, and the court will not make charitable legacies to be exempt, unless that appears. Here, in the general bequest bequeathed to the testator has no regard to propinquity of himself, and the duty of 10 per cent. is charged on the whole sum. It is important to advert to the provisions of the statute with respect to retainer, which is to apply to the present case, where the sum was retained by the executors from the common fund of the trust for the benefit of the class. By the Statute, c. 52, s. 6, under which statute the duty is charged, it is provided that the duties shall be accounted for by the executor or administrator upon retaining any legacy or residue. [Bosanquet J. Then your wife had been the executrix there would have been no duty payable.] No, the retainer is not for the benefit of the executor, but of a particular class. [Bosanquet J. How do you reckon the relationship between the testator and the legatees? They are strangers in blood.] [Bosanquet J. But they are all relatives.] The testator in his will does not contemplate them as such. In the *Attorney-General v. Burnie* (a), where the residue was bequeathed to the testator's husband, who was the testator's son, and though the legal effect of the bequest was to



If with reference to the wife's, because the testator contemplated the wife as taking an equal interest with her husband. In the court below, the 11th section of 36 Geo. 3. c. 52. was much relied on, as being in favour of the defendants, and it was contended that it had been framed to meet this particular case. It is admitted it was drawn to meet a case widely different (a). It is to be inferred from the 39 Geo. 3. 13. which was enacted to exempt from legacy duty *specific* legacies given to bodies corporate and *ex public* bodies and societies, that but for that statute such legacies would be liable to duty. Pecuniary bequests are not exempted, and on them 10 per cent. is payable, though possibly some of the trustees may be relatives of the testator, and known by him to be such. So by the 56 Geo. 3. c. 56. the *Irish* stamp duty on legacies bequeathed "to be applied in support of any public charitable institution in *Ireland*, or for any purpose merely charitable," are expressly exempted from duty. That raises the inference, that in the *Irish* act the legislature intended that a legacy, though for a charitable purpose, should be liable to duty. *Ex parte Franklin* (b) is a direct authority that the duty is payable in a case like the present. A Vice-Chancellor there puts the question on its proper ground;—that the intention of the testator is general—that in effect it is a gift for a general charitable purpose, which does not contemplate any individual recipients. He says, that with respect to legacies for charitable purposes, a construction has been put on them by the general consent of mankind. The general practice and usage, as stated by the Vice-Chancellor, are entitled to considerable weight, as also the contemporary exposition of the statute. Bequests to hospitals are not distinguishable in substance

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See Gwynne on Legacy Duties, p. 91.

(b) 3 Y. &amp; J. 544.

have the governing authority over it, the corporation or society may be looked upon as taking the interest. But even if that were so, the executors take the beneficial interest, for they have a control over these funds, and as much discretion of patronage in their application, as the trustees of a hospital have. It is submitted, however, that in either case are the trustees to be considered as beneficial legatees, but as taking the bequest in a class, and consequently the duty is payable on the whole sum which is retained for the benefit of the class. The convenience of this construction is obvious. But if the parties receiving the charity are not beneficial legatees, then supposing 10*l.* to be payable to one person one year, and 10*l.* the next, the duty would be payable every year. It would be extremely inconvenient for the government had to watch and see how much was payable every year, for there would be great difficulty in ascertaining the amount of legacy duty to be paid and when it was payable. [*Littledale J.* There would be no difficulty here, for the executors would be bound to retain the duty when they gave the sum to the same party.] But if the executors are directed to do so how is the fact to be ascertained? [*Gaskell J.* They may be called upon to render an account every year. *Parke J.* They are not

suppose the case of a gift to the members of a commercial fund living at the death of certain persons?] Here the parties might be ascertained, and might maintain a suit for the legacy, but here "poor pious persons" could not, therefore they must be charged as class.

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*Stephen Serjt.* for the defendants. To tax the subject, the act imposing the charge must be clear and unambiguous. To constitute a legatee under the 5 Geo. 3., the party must take beneficially, for the duty is expressly on bequests given for the benefit of some individual. It is also essential that he should stand in some ascertained relationship to the deceased. Here, it is submitted the persons selected by the executors are the parties who take beneficially, and whose relationship may be ascertained. The case has been argued to-day as a legacy to "poor pious persons," as class, but in the court below it was contended that the executors took beneficially, and were chargeable with duty in respect of their propinquity to the testator. As one of the executors is a son of the deceased, moiety of the residue would, according to this view, be taxed 10, and the other 1 per cent. only, which is absurd; and that ground being felt untenable, it is now insisted that this must be considered as a legacy to a class. Can it be said that it is a legacy to a class? Now can "poor pious persons" form a class? The will does not contemplate all the "poor pious persons" in *England*, but such only as the executors may select. Now, if there be a class at all, it is composed of all "poor pious persons," but is it not strange to say they form a class, when the benefit is for those alone who may be selected? But if they do form a class, who are the parties to be taxed? The first person selected may be a relative,—is he to be taxed as a

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stranger in blood? Although they could not be charged separately, are the parties to be made liable as a class? It is a fallacy to talk of taxing a class, which means, if any thing, that the charge is to be made on the fund. The effect of taxing the fund would be to prevent parties from being selected. By taking 300*l.* from 3000*l.*, 30 persons, instead of receiving 10*l.* a piece, would receive nothing. But with respect to those persons who did receive a share there would be no difference. Therefore the fund would be taxed and not the class. But that is not the intention of the legislature. This is not a property tax, but it would be made so if 10 per cent. were taken from the fund. The argument for taxing the class is, that "poor pious persons" may be considered as a sort of corporation, and as executors may retain for a corporation, so they may for "poor pious persons." But corporations are recognized in law. So bequests to public bodies, not strictly corporations, are known. Corporations, take *quæ* corporations, and other public bodies as societies. In the case of a bequest to a corporation, the testator has no view to individuals, but to the body, and therefore it falls strictly within the language of the Vice-Chancellor in *Ex parte Franklin*. But a legacy to individuals is the very reverse, for it is only in respect of their relationship to the testator that they are liable. It is said that the duty is imposed on all legacies, but that is not so—it is only imposed in certain defined cases. If it were necessary the defendants might say that this is a *casus omissus*, but they stand on the ground taken in the court below, that it is within the 11th section of the 39 Geo. 3. c. 52. Should the court, however, feel any difficulty in saying it is not within that clause, it is submitted that this is not a case contemplated by the act at all. This is neither a bequest to relatives, nor to strangers in blood,

*et non constat*, the objects of the bounty may be strangers. That section, however, is obviously framed to meet the present case, for here the duty cannot be ascertained till the application of the fund. The only answer attempted to this clause is the inconvenience which would arise in collecting the duty, but executors are bound by heavy penalties to account for all duty which may be payable, and the argument applies equally to all cases of partial interest, under which head this may be ranked. With respect to giving two sums to the same individual, it may be questionable whether the executors can do so, for they might give a fresh sum every day to one person, and so defeat the object of the bequest; but supposing they can give twice to the same party, when the sum given amounts to 20*l.* they will be bound to retain the duty. An inference is said to arise from the exemption in the Irish act, but by that statute legacies to bodies corporate and public societies are expressly charged, and therefore it was necessary to except charitable institutions, which would otherwise have been liable to duty. In the *English* act individuals only are expressly charged, and though the practice has been to pay duty on legacies to charitable institutions in *England*, it has never been decided in a court of law that they are properly chargeable with duty.

*Amos* in reply. The 11th section of the 36 *Geo.* 3. c. 52. was not adverted to in *Ex parte Franklin*, because it was there considered that the parties who receive the money from the executors are not the parties to pay. That section would certainly remove the difficulty of collecting the duty, provided the persons receiving the money from the executors are to pay the duty, but that is assuming the whole question. *Ex parte Franklin* decides that the duty is to be paid

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by the executors for the class. The exemption in 56 Geo. 3. c. 56. applies to legacies for charitable purposes, not comprised in the previous charging words. It shows, therefore, that but for the exemption it would have been comprehended in the general words which are the same as occur in the 55 Geo. 3. c. 18.

Lord DENMAN C. J.—We are all of opinion that this judgment must be affirmed. The question certainly is an important one. We are clear that the court below were right in the view they took of the 11th section of the 36 Geo. 3. c. 52, and I do not know how they could have come to any other decision. My brother Parke, in giving judgment, said, that this case is hardly to be reconciled with *Ex parte Franklin*, but that case does not appear to have been much considered, and we do not know what the Vice-Chancellor might have determined, if that clause had been brought before him. It is possible that he might have still remained of the same opinion, but it is also possible he might have taken the view that this case now takes, which is, that where an uncertainty exists as to the mode in which the bequest will be beneficial to any party, the parties beneficially interested are to pay the duty in the manner therein described. It seems to me that this case falls completely within the words and meaning of that section, and consequently that no duty is payable by these defendants in respect of the residue.

Judgment affirmed.

END OF HILARY TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

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REGULÆ<sup>(a)</sup> GENERALES,

*Easter Term, 6 Will. IV.*

## EXAMINATION OF ATTORNIES.

1836.

REGULATIONS approved by the Judges in *Easter term* 1836, for the examination of persons applying to be admitted as attornies of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the rule of Court made in *Hilary term* 1836, [*ante*, p. 233.]

Whereas by a rule of the Courts of King's Bench, Common Pleas, and Exchequer, made in *Hilary term* 1836, it was ordered that the several masters and prothonotaries for the time being of the said Courts respectively, together with twelve attornies or solicitors, should be appointed, by a rule of Court in *Easter term* in every year, to be examiners for one year of persons applying to be admitted attornies of the said Courts,

(a) See note in next page.

by the major part of such examiners actually present at the time of conducting his examination, testifying his fitness to be an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless specially extended by order of a Judge of the said Courts; and it was further ordered that the said examiners so appointed should conduct the said examinations under the direction of the said Masters and Prothonotaries, and that until further order such examinations should be held in the hall or building of the Incorporated Law Society of the United Kingdom, in *Chancery Lane*, on such days as should be appointed within the last ten days of every term) as the said Masters and Prothonotaries or any five of them shall appoint; and that any person who had been previously admitted of any of the three Courts, and who had not been of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the Secretary of the said society at their said hall.

And whereas by a RULE of all the said Courts made at the present *Easter* term (a), it was ordered that the said Masters and Prothonotaries for the time being of the said Courts respectively, with *Thomas Adlington, Jonathan Dredd, George Frere, James William Freshfield, John Bryan Holme, William Lowe, Edward Rowland Pickering, John White Sweet, William Tooke, Richard White, and Edward John Wilde*, gentlemen, attornies, should be and the same were thereby appointed examiners for one year then next ensuing to examine all such persons as should desire to be admitted attornies of all or either of the said Courts from and



ld be competent to conduct the said examination in pur-  
ce of and subject to the provisions of the said rule in  
ry term last.

pursuance of the said rules, the following *Regulations* for  
lecting the said examinations have been submitted to and  
oved by the Judges of the said Courts :—

st. That every person applying to be admitted an at-  
ry of any of the said Courts, pursuant to the said rules,  
, within the first seven days of the term in which he is  
one of being admitted, leave or cause to be left with the  
tary of the said incorporated Law Society, his articles of  
ship duly stamped, and also any assignment which may  
been made thereof, together with answers to the several  
ions hereunto annexed, signed by the applicant and also  
e attorney or attornies with whom he shall have served  
erkskip.

cond. That in case the applicant shall show sufficient  
to the satisfaction of the examiners why the first regu-  
cannot be fully complied with, it shall be in the power  
e said examiners, upon sufficient proof being given of  
une, to dispense with any part of the first regulation they  
think fit and reasonable.

ird. That every person applying for admission shall also,  
quired, sign and leave, or cause to be left, with the secre-  
f the said society, answers in writing to such other written  
nted questions as shall be proposed by the said exa-  
s touching his said service and conduct, and shall also,  
quired, attend the said examiners personally for the pur-  
of giving further explanation touching the same, and  
also, if required, procure the attorney or attornies, with  
he shall have served his clerkship as aforesaid, to  
s personally or in writing, any question touching such  
e or conduct, or shall make proof to the satisfaction of  
id examiners of his inability to procure the same.

urth. That every person so applying shall also attend the  
xaminers at the Hall of the said Society at such time or  
as shall be appointed for that purpose, pursuant to the  
ile as the said examiners shall appoint, and shall answer

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such questions as the said examiners shall then and there put to him by written or printed papers touching his capacity and fitness to act as an attorney.

Fifth: That upon compliance with the aforesaid regulations and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters or prothonotaries) shall be satisfied to the fitness and capacity of the person so applying to act as an attorney, the said examiners present, or the major part of them, shall certify the same in the following form, under their hands; viz.

In pursuance of the rules made in *May and Easter* term 1856, of the Courts of Common Pleas, King's Bench, and Exchequer, we, being the major part of the examiners actually present at and conducting the examination of *A. B. &c.*, do hereby certify that we have examined the said *A. B. &c.* as required by the said rules, and we do testify that the said *A. B.* is fit and capable to act as an attorney of the said Courts.

(Signed by all the Judges.)

Questions as to due service to be answered by the Clerk.

1. What was your age on the day of the date of your articles?
2. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articulated or assigned, carried on his or their business? if not, state the reason.
3. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articulated and assigned? if so, state the length and cause of such absence.
4. Have you during the period of your articles been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articulated or assigned?
5. Have you since the expiration of your articles been engaged or concerned, and for how long time, in any and what profession, business, or employment?

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other than the profession of an attorney or  
solicitor, or employment, other than the profession of an attorney or  
solicitor, or employment, other than the profession of an attorney or

Questions as to the entries to be answered by the Attorney.

1. Has A. B. served the whole term of his articles at the office  
where you carry on your business? if not, state the reason.

2. Has the said A. B. at any time during the term of his articles  
been absent without your permission? and if so, state the length and  
dates of such absence.

3. Has the said A. B. during the period of his articles been con-  
tacted or engaged in any profession, business, or employment, other  
than his professional employment as your articled clerk?

4. Has the said A. B. during the whole term of his clerkship, with  
the exceptions above-mentioned, been faithfully and diligently em-  
ployed in your professional business as attorney or solicitor?

5. Has the said A. B. since the expiration of his articles been en-  
gaged or concerned, and for how long time, in any and what pro-  
fession, trade, business, or employment, other than the profession of  
an attorney and solicitor?

And I do hereby certify that the said A. B. hath duly and  
faithfully served under his articles of clerkship (or assign-  
ment, as the case may be,) bearing date, &c. for the term  
therein expressed, and that he is a fit and proper person to  
be admitted an attorney.

WRIGHT against SKINNER.

**BEFORE** showing cause against a rule granted in Where the  
the last term, it was objected, that the whole of master report-  
the matter then appearing on the affidavit in support ed that part of  
an affidavit, on  
which a rule  
had been ob-  
tained, had  
been added to the affidavit after it was sworn, the court refused to discharge the rule  
in costs, to be paid by the defendant, but only suffered that part of the affidavit  
which had been sworn, to be used. *Semble*, that a special application for costs, to be  
made by the attorney, would have been successful.

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but had been added afterwards. The rule was enlarged to this term, in order that the master might report on the fact. He reported that the affidavit was altered after it was sworn, by adding certain matter to it.

LORD ABINGER C. B.—I was certainly disposed to discharge this rule with costs, and to hold that an affidavit altered after it is sworn, is a nullity which cannot be used at all. But as no special application has been made, that the defendant's attorney shall pay the costs, it will perhaps be hard to inflict them on the defendant, who may have had no share in the alteration.

PARKE B.—The plaintiff's counsel object to the use of a part of the affidavit, on which perjury could be assigned. This case resembles that of an objection to a jurat of an affidavit which renders it useless; in which instance it is not the practice to discharge the rule obtained thereupon with costs.

ALDERSON B.—Any alteration in an affidavit after it is sworn is most scandalous.

The *Court* conferred: and finally held that so much of the affidavit as had been sworn might be used in support of the rule; and that cause might be shown on the merits.

*C. Jones* supported the rule, *Platt* and *Gale* for the cause.

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HARDING *against* STOKES.

DEBT on 5 & 6 W. 4. c. 76. s. 54. The declaration stated that the borough of *Bristol* (a) is a borough in which, by a certain act of parliament made and passed in the sixth year of his present majesty (b), intituled "an act to provide for the regulation of municipal corporations in *England* and *Wales*," it was provided and directed that an election should be had and made of a certain number of fit persons, who should be and be called the councillors of the said borough; and the plaintiff saith that heretofore, to wit, on 26th *December* 1835, the election of such councillors took place in pursuance of the said act; and before and at the said election *R. P.*, *J. B.*, and *H. G.*, were candidates to be elected as councillors of the said borough; and the plaintiff in fact saith that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit on the 24th *December* in the year last aforesaid, did corrupt one *J. Wakefield*, who then and from thenceforth until and at the time of the said election, had a right to vote in the said election, to give his vote in that election for the said *R. P.*, *J. B.*, and *H. G.*, so being such candidates as aforesaid, by corruptly promising to give the said *J. Wakefield*, if he should vote in the said election for the said *R. P.*, *J. B.*, and *H. G.*, employment in hauling stones as and for certain hire and reward to be paid for the same, which said employment was so then promised by the said defendant to the said *J. Wakefield*, as and for a reward to

An averment in a declaration for a penalty that the defendant did corrupt one *J. W.*, who had then a right to vote at an election of town councillors, by corruptly promising to give him employment in hauling stones for hire, to be paid him for the same, which employment was promised to *J. W.*, as and for a reward to him if he should vote at such election for particular persons, is sufficiently laid as a promise of a reward, so as to subject the party offering it to a penalty of 50*l.* under s. 54 of 5 & 6 W. 4. c. 76: unless, on proper issues joined on the record, the employment should be found by a jury to have been promised to the voter

(a) See 5 &amp; 6 W. 4. c. 76. s. 142.

(b) 9 September 1835.

without a corrupt object on the part of the party promising. Held also, that as the offence was laid to be "contrary to the form of the statute," it was not necessary to lay it to have been committed "after the passing of the act," though that took place very recently before: and that at all events, an allegation that an election of councillors took place in pursuance of the act, and that the defendant, not regarding the statute, corrupted the party to vote in such election, was sufficient.

ant the sum of 50L., yet &c. General demurrer. The marginal note on the demurrer stated, that it did not sufficiently appear on the allegation that the voter was corrupted by gift or within the meaning of 5 & 6 W. 4. c. 76, s. 54.

*Whateley* supported the demurrer. Stat. c. 24. s. 7. is transcribed in the section now under consideration. First, the mere offer or promise of payment in hauling stones, made to a party entitled at the election of a town councillor, does not constitute a party promising to a 50L. penalty under the act, appears that the wages the voter was to receive were unreasonable. Secondly, employment in hauling is not a "reward" within it; for though a party agrees or contracts for any employment or reward, to give or forbear to give his vote in an election forfeits 50L., the party promising is made so liable. The section (a) contains two

(a) 5 & 6 W. 4. c. 76. s. 54. enacts as follows: "That if any person who shall have to discharge or have any right to vote in any election for a councillor, auditor, or assessor of any borough, shall, after the passing of this act, ask or take any money, or other reward, by way of gift, or by any other device, or agree or contract for any money, gift, office, or other reward whatsoever, to give, or forbear to give his vote in any election, or if any person by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or

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classes, relating to two classes of persons. The first class, voters who contract *inter alia* for any employment; and the next, persons who by promise or security for any gift or reward (omitting the word employment) corrupt or procure any person to give or forbear to give his vote in any election of a town councillor. Under the terms of the employment should have been distinctly set out in the declaration. Thus, in *Colborne v. Stockdale (a)*, an action on a money bond, it was held, that in order to establish a defence that it was given for money lost at play, the particular illegal game at which the money was lost should be alleged in the plea, it being matter of law, and not of evidence merely, so that the court would be thereby enabled to see that an offence had been committed within the statute. Lastly, this is a penal act, and to be construed strictly. Then if this is a corrupt contract for employment or reward within the act, the declaration does not show it to be made after it passed; and from the recent period at which it actually passed, (9 September 1835,) it is quite consistent with probability, as well as the count itself, that it was made before that event.

*Addison contra.* The main question is, whether the matter promised to the voter was an "office or employment" within the act. [Lord Abinger C. B. Or a reward?] The distinction attempted to be shown between the classes of s. 54 does not exist; the words "office or employment" are not repeated in the second clause, but "gift, office, employment, or other reward," being the expression used in the first, the legislature had already defined what the "reward" was which was within the

The section then proceeds to disable for ever persons lawfully convicted of such offences, from voting in any election, municipal or parliamentary, in any part of the united kingdom, and from holding any office in the borough, &c.

cf. *Strange*, 498, 499.

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penal enactment of the section, so that it would have been tautology to reinsert them in its second clause [*Alderson* B. You contend that agreeing to give employment is agreeing for a reward.] The words "gift or reward" in the second clause, are explained by the context. [*Parke* B. If they do not bear the same meaning they did in the earlier part of the section, the giving money would not be within the second clause. it.] The 49 G. 3. c. 118. is a legislative declaration as to the meaning of the word "reward." In the preamble it states, that the giving or promising to give a sum of money, gift, or reward, or any office, place, employment, or gratuity, except to particular persons there mentioned, is not bribery within 2 G. 2. c. 24. but if such gifts or promises are contrary to the laws and constitution of this realm; and then proceeds to provide against the giving or promising to give any sum of money, gift, or "reward," to any person, without the giving "reward," the same sense as in the place of its earlier mention, and ascribing to it a more extensive one, including "office, place, employment, or gratuity," as before stated.

The second objection is answered by the allegation of the count, that "the employment was in the hiring of stones at and for certain hire and reward." This is such an employment a reward? If it appears on the declaration that it might have been a sufficient reward, that is sufficient. All contracts for performing work are, in contemplation of law, beneficial to the party employed, as giving him a claim to wages. The promise of an office with a salary would be equally so of the act, if it could be argued that the salary was only a fair compensation for the labour bestowed. The situation in life of persons having votes should also be considered as one in which a promise of employment must be taken to have considerable effect. The section, though penal, being for suppression of wrong



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must be construed by equity so as to defeat a mischief clearly within it. See *Plowden's Comm.* 86 b, cited in *Can. Dig.* tit. Parliament, (R. 19); and per *Coleridge J.* *Henslow v. Fawcett* (a), *Rex v. Hodnet* (b).

As to the declaration not alleging that the offence was committed after the act passed, it will be sufficient if that fact appears from the whole declaration; for it is not pointed out as a special cause of demurrer in the margin of the demurrer-book. (c) The declaration alleges that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on &c., did corrupt &c. [*Parke B.* The day on which the defendant is alleged to have corrupted the voter is not material; but the count goes on to allege that the defendant "did corrupt one *J. Wakefield*, who then and from thenceforth, until and at the time of the said election, had a right to vote in the said election, to give his vote in that election." Now "that election," being of councillors of the borough, could only take place under the statute (d).]

*Whateley* replied.

Lord ABINGER C. B.—I am of opinion that this declaration alleges a case within the penal enactment of sect. 54 of the municipal corporation act. If the promise of "employment" was made distinct from a promise of "reward," such employment would be shown to be one

(a) 3 Ad. & El. 51.

(b) 1 T. R. 96.

(c) As to the necessity for this averment, the act of parliament being recent, see per *Parker, C. J.* in *Regina v. Rawlinson*, *Gilbert's Cases in Law and Equity*, 242. and cases on 5 El. c. 4. collected, 1 Saund. 309 a, n. (5).

(d) So in *Baynham v. Matthews*, *Fitzgibbon*, 130. Debt on a promissory note, the date of which was set forth, and appeared to be after the stat. Ann. against usury. Plea, that the sum in the note was lent on usurious interest, not averring that the note was given subsequent to the late act against usury. The court resolved that by the date of the note, as stated on the pleadings, it sufficiently appeared to have been so given.

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species of reward within the first clause of that section, but when the second clause went on to add, that if any person shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt or procure any person to give or forbear to give his vote, it is clear to me that the legislature intended to embrace and include in more general terms, all that had been enacted before. It would be a question for a jury, whether or not the pay to *Wakefield* for his labour in hauling stones was a reward, by which the defendant corrupted or offered to corrupt him against the act. Where there is but one employment, and many persons seeking it, the preference in being employed, though at the ordinary wages, might be considered to be such a "reward" as the legislature intended to make illegal. But that is a question not for the court, but for a jury. There is no doubt that that is an "employment," from which the party employed derives his sustenance.

PARKE B.—The only real question in the case is, whether the legislature intended to make a distinction between the offence of the party, who, by promise of gift or reward, offers to corrupt any person to give his vote at an election of town councillors, and that of the voter, who agrees to give or forbear so to give it, for any "gift, office, employment, or other reward;" and it is clear that it was not so intended. The court can see from the first branch of the section what the words "gift or reward" mean in the place in which they are used in the second. Those words are there used to include every thing of that kind mentioned in the whole section, and treat "employment" as a "reward." So indeed in common parlance it is to him who, wanting employment, obtains it, and with it a right to receive money on that account. The declaration positively avers a corrupt promise by the defendant to *Wakefield*, of employment in

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ing stones, if he voted for particular persons, & employment, is one which may be beneficial, if it is for money, as it must be taken to be; and it is for a to say, whether it was contracted for as a reward giving or forbearing to give his vote in any such tion. The declaration appears to me to be cor- h framed, in order to allege such a corrupt offer in the statute, as it would be for the plaintiff to blish in evidence before a jury. As to the corrupt, not being laid to have been made after the statute, ink that need not be done. Even in indictments, burglary under the late act of 11 G. 4. and 1 W. 4. 6. the offence is never laid as having been com- ed after the act passed; besides which, the de- ant is here charged with the fact as being "con- y to the form of the statute."

OLLAND B.—I am of the same opinion. This act, medial as well as penal, and must be liberally con- ed, in order to give effect to its provisions, and pre- the mischief contemplated by it.

LARSON B.—As the word "reward" in the first ch of the section includes "employment," it must ken to do so in that part of the second in which it is. The question, whether the defendant pro- d to give the employment with a corrupt view, is not for the court, but a jury. The declaration posi- ly avers that it was so promised as a reward for the ; but that question is not as yet in dispute on the dings.

Per Curiam.—The plaintiff is entitled to judg- ment; but as this is the first case which has oc- curred on this act, the defendant may be let in to plead, on payment of costs.

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FISHER *against* WAINWRIGHT.

Assumpsit on an undertaking by the defendant to pay such costs as the plaintiff should incur in an action to be brought by him against G. on a bill of exchange, drawn on him by the defendant and then due, which the plaintiff had agreed to take up for the defendant's honour. There was also a count by the plaintiff as indorsee of the bill, with a

**A**SSUMPSIT. The declaration of 1st *January* 1836, consisted of several counts. The first stated, that before and at the time of making the promise therein after next mentioned, a certain bill of exchange in writing, bearing date 13 *April* 1835, had been made and drawn by defendant upon and accepted by one *W. H. Guy*, whereby the defendant required the said *W. H. Guy* to pay to the order of the defendant 30*l.* three months after the date thereof, which said bill of exchange had been and was indorsed by the defendant to one *M. W.* who had indorsed the same in blank; and that it was lying due and unpaid at the Bank of England, of all which the defendant had notice; and thereupon heretofore, to wit, on the 17th *July* in the year aforesaid, in consideration of the premises, and also in consideration that the plaintiff, at the expense of defendant, would take

count for money paid, interest, and on an account stated. Pleas: first, payment into court on the first count (of a sum which covered the plaintiff's costs out of pocket); secondly, to the second count, that after the bill became due, the defendant paid a certain sum in part satisfaction of it, and indorsed to and gave the plaintiff another bill which he took in satisfaction of the residue of the bill declared on. The issue on the first plea was, whether the plaintiff had sustained further damages than the sum paid into court; and on the second plea was, whether the second bill was so given and accepted in satisfaction of the first, or only as a collateral security. The first particulars of demand only embraced the count on the bill. The defendant obtained an order for "particulars of the bill of costs, charges, and expenses mentioned in the first count." The particulars delivered under this order were a copy of the plaintiff's whole bill of costs in the action against G., and also the amount of the bill and interest. Held, that the costs out of pocket could be recovered on the first count; and the rest of the bill on the account stated.

Held also, that had the particulars been insufficient to enable the plaintiff to recover the costs on the account stated, proof by the defendant of an unsigned paper delivered to him by the plaintiff as a statement of plaintiff's claims against G., one item being his bill of costs, was not such unambiguous evidence of an account stated between them as would have entitled the plaintiff to recover those costs under the last count, notwithstanding such defective particulars, upon the proofs adduced by his adversary.

the said bill and pay the amount thereof for the honour of defendant, and would commence and prosecute an action against the said *Guy* upon and for the recovery of the amount of the said bill in the name of the plaintiff as indorsee thereof, he the defendant then promised the plaintiff to pay him, the plaintiff, the amount of all such costs, charges, and expenses, as he the plaintiff should incur, bear, sustain, and be put unto for and by reason of his commencing and prosecuting such action against the said *Guy* upon said bill of exchange as aforesaid, in case he the plaintiff should be unable to obtain the same from the said *Guy*. Averment, that the plaintiff, relying in the defendant's promise, did afterwards, to wit, on &c., take up the said bill of exchange, and pay the amount thereof for the honour of the defendant, and did then also commence and prosecute an action in his majesty's Court of Exchequer of *England* at *Westminster* against the said *W. H. Guy*, upon and for the recovery of the amount of the said bill, in the name of the plaintiff, as indorsee thereof, and that he the plaintiff necessarily and unavoidably incurred, bore, sustained, and was put unto divers costs, charges, and expenses in the whole amounting to a large sum of money, to wit, the sum of 11*l.* 14*s.* 6*d.* in and about the commencing and prosecuting of the said action against the said *W. H. Guy*, as aforesaid.

That the said *W. H. Guy* afterwards, to wit, on 17th *November* aforesaid, became and was a bankrupt within the true intent and meaning of the several statutes made at that time then in force concerning bankrupts, and that he the plaintiff hath been and is wholly unable to obtain payment of the said sum of 11*l.* 14*s.* 6*d.* from said *W. H. Guy*, or any part thereof; whereby, and according to the tenor and effect of his said promise, the defendant became liable to pay the plaintiff the said sum of

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30*l.* three months after the date thereof, statements by defendant to M. W., and by him to Averment, that Guy did not pay said bill presented to him on the day it became due; defendant had notice; yet defendant hath done his last-mentioned promise, and, although he has paid the plaintiff a part of said last-mentioned bill, the other part thereof, to wit, 27*l.* 8*s.* 6*d.*, remains due.

Counts for money paid, for interest, and for costs due on an account stated.

Pleas: first, as to the cause of action in the first count, payment into court of 4*l.* (*viz.*, the costs out of pocket); second, to the second count, after the bill of exchange in the second count became due and payable according to the tenor and effect thereof, and before the commencement of this suit, to wit, on 1st November 1835, he, defendant, paid to plaintiff, and plaintiff then accepted and received of defendant, on account and in part of said sum of money in said bill of exchange mentioned, divers sums of money, amounting together to a sum of 14*l.* 16*s.*, and that afterwards, and before the commencement of this suit, to wit, on the 1st day of December 1835, &c. the defendant indorsed to the plaintiff, and plaintiff then took, accepted, and received of defendant, as and for a security for the payment of said bill of exchange, a certain

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cepted by one *Sabine*, for the payment to said *Day*, or his order, of the sum of 16*l.* 6*s.*, and indorsed by *Day* to defendant. Averment, that at the time of the commencement of this suit, the last-mentioned bill was not due or payable according to the tenor and effect thereof. Verification. Lastly, to the causes of action in the third, fourth, and last counts, *non assumpsit*.

Replications: to first plea, that plaintiff had sustained greater damages than 4*l.* paid into court by defendant; to second plea, traversing the payment, or so much of it as related to 14*l.* 16*s.* there mentioned. And as to the residue of said second plea, *precludi non*, because plaintiff saith that the said bill drawn by *Day* and accepted by *S.*, was indorsed by defendant to plaintiff, and by plaintiff accepted and received of and from defendant, upon the express terms and conditions that the said last-mentioned bill should remain with the plaintiff, and be kept by him as a security, on his, the plaintiff's forbearing to proceed against the defendant upon the bill in the second count mentioned until 30th November 1835, by which day defendant promised plaintiff to pay him the sum of 37*l.* 8*s.* 6*d.* so due and owing upon said bill, as in said second count mentioned; but that if defendant did not pay to plaintiff said last-mentioned sum by that day, plaintiff should be at liberty to proceed against defendant for said sum of 27*l.* 8*s.* 6*d.*, as if said bill so drawn by *Day* and accepted by *S.* had not been indorsed to plaintiff as aforesaid. Averment, that plaintiff did, upon the terms aforesaid, forbear to proceed against defendant upon said bill in the second count mentioned, until after 30th November 1835; whereof defendant then had notice, but defendant did not then or at any time afterwards pay to plaintiff said sum of 27*l.* 8*s.* 6*d.* or any part thereof. Verification.

Issue joined on last plea.

Rejoinder, taking issue on replication to first plea,

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and as to replication to so much of second plea as relates to the sum of 14*l.* 16*s.*, and as to the replication to the residue of the second plea that defendant indorsed to plaintiff, and plaintiff took, accepted, and received of and from him, defendant, said bill of exchange, drawn by said *Day* on and accepted by *S.*, as and for such security as in second plea mentioned; without that said bill drawn by *Day*, on and accepted by *S.* was indorsed by defendant to plaintiff, or by plaintiff accepted and received of and from defendant, on the terms in said replication in that behalf mentioned.

After the declaration was delivered, the defendant obtained a baron's order for particulars of the "costs charges, and expenses mentioned in the first count of the declaration." The particulars delivered detailed the items of such costs, amounting in all to 11*l.* 14*s.* 6*d.* and also charged 30*l.* for a bill due *January* 16, 1836, with four months interest to 17th *November* 1835, amounting in all to 42*l.* 4*s.* 6*d.* At the trial before the Lord Chief Baron, at the *Guildhall* sittings after last term, it appeared that a bill for 30*l.* drawn by the defendant, and accepted by *Guy*, having been dishonoured, the defendant requested the plaintiff, an attorney, to take it up for his the defendant's honour, without prejudice to the plaintiff's right against any party to the bill, including the defendant himself; and afterwards at the defendant's request, and on his promise to pay the plaintiff any costs incurred in suing *Guy* sued *Guy* on the bill to recover 30*l.* *Guy* became bankrupt pending the action, and the defendant ordered the plaintiff to countermand the notice of trial. The costs out of pocket in *Fisher v. Guy* amounted to 4*l.*, and in all to 11*l.* 14*s.* 6*d.*; which with the 30*l.* and 10*s.* interest thereon amounted to 42*l.* 4*s.* 6*d.* On 24th *November* 1835 the defendant's agent paid the plaintiff 13*l.* in part, and handed over to him



for 16*l.* 16*s.*, becoming due 30th *December* 1835; plaintiff's attorney thereupon gave the defendant's agent this memorandum, which was produced as part of the defendant's case at the trial.

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|                                                   |         |
|---------------------------------------------------|---------|
| 24th <i>November</i> 1835.                        | £ s. d. |
| Paid on account <i>Guy's</i> bill and the costs . | 13 0 0  |
| <i>Sabine's</i> bill . . . . .                    | 15 14 0 |
|                                                   | <hr/>   |
|                                                   | 28 14 0 |
| Balance due on <i>Guy's</i> bill . . . . .        | 1 16 0  |
|                                                   | <hr/>   |
|                                                   | 30 10 6 |
| Costs to be paid (a) . . . . .                    | 11 14 6 |
|                                                   | <hr/>   |
|                                                   | 42 4 6  |
|                                                   | <hr/>   |

After this account was delivered the defendant's agent promised to call before the 30th and pay the residue of the debt and costs; 1*l.* 16*s.* was afterwards paid to the plaintiff's attorney on the defendant's behalf.

The plaintiff's attorney swore that he took *Sabine's* bill from defendant before it was due as a collateral security only till the 30th *November*, and not in part payment of the debt. The defendant contended he was only liable on the first count for costs out of pocket. Lord *Abinger* told the jury that the plaintiff was at liberty to appropriate the 13*l.* received from the defendant to part payment of *Guy's* bill, which he had taken up for defendant; and that the evidence of defendant's agent promised to call again on the plaintiff's attorney, and pay the 11*l.* 14*s.* 6*d.* due for costs, was admissible on the account stated, so that the plaintiff might recover the balance of costs due above and out of pocket on that count, which was thus opened by the above appropriation. Verdict for the plaintiff on the account stated for 7*l.* 10*s.*, the balance

(a) *Viz.* in *Fisher v. Guy*.

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of costs found to be due after crediting the plaintiff's court as costs out of pocket, and proved to be sufficient for them. The jury found for the defendant on the first plea; and on the second, that a bill for 16*l.* 16*s.* was given and received in payment of the debt due from the defendant (a).

*Kelly* moved in this term for a new trial, ground that the plaintiff had estopped himself by his sets of particulars from recovering the costs account stated; nor was a specific accounting [Lord Abinger C. B. The first particular was evidence on the impression that the plaintiff had to apply the payment made by the defendant to the costs due from him. I thought his proofs were restricted to any particular count, and that the abundant evidence of an account having been between the parties. It was also contended that the plaintiff could only recover the costs out of the first count.] A rule having been granted.

*Bompas* Serjt. and *W. H. Watson* showed cause. The question is, whether the plaintiff was entitled to recover on the count on an account stated? The particulars do not prevent the plaintiff from recovering the amount of the bill for 30*l.* with interest, and the costs to which the defendant was liable. Though by the judge's order the plaintiff was called on to furnish particulars of demand on the first count, those actually furnished detailed items of claim which could be established on any count unless there was fraud by the plaintiff, or the defendant was misled or surprised at the trial, this rule

(a) The 16*l.* 16*s.* bill was paid after this action brought, *v. Aylett*, 2 Camp. 329.

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be discharged; *Lambirth v. Roff* (a), *Davies v. Edwards* (b). It is sufficient if a bill of particulars expresses to the defendant the matter on account of which the plaintiff's claim arose, though without the technical nicety of a declaration, *Brown v. Hodgson* (c), *Heath J.* saying that the courts must not drive plaintiffs to their special pleaders to draw their bills of particulars. But *Hurst v. Wathiss* (d) shows that if a defendant makes out a better case for the plaintiff, than he himself could do under the particulars delivered, he may avail himself of that proof upon his declaration. Now the paper put in by the defendant admitted 11*l.* 14*s.* 6*d.* to be due to the plaintiff for costs. Though it was produced to show that the bill which the plaintiff's attorney swore was deposited as a security only, was in fact taken as part payment, it became evidence for the plaintiff for the other object. [*Parke B.* Is it not doubtful whether the paper showed more than that the plaintiff claimed 11*l.* 14*s.* 6*d.* for costs?] The defendant, by giving evidence to destroy one count, set up that on the account stated.

*Kelly and Busby contra.* The defendant was misled by the particulars as to the amount to be paid into court, and as to the evidence necessary to be adduced on his side; and was surprised at the trial by the application of the acknowledgment put in by the defendant to the count on the account stated. The main question at *trier prius* was, whether the defendant was liable to pay more than 4*l.* the costs out of pocket, and whether the bill for 80*l.* sued on in the second count, had been completely paid; and the jury having found that the bill for 16*l.* 16*s.* was deposited with the plaintiff not by way of collateral security, as he asserted,

(a) 8 Bing. 411.

(b) 3 M. &amp; S. 380.

(c) 4 Taunt. 189.

(d) 1 Camp. 68.

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but in part payment generally, all question on the bill is at an end. Now the particulars clearly apply to money paid on account of the bill. [*Parke B.* Perhaps, strictly speaking, these are particulars of demand on the counts for money paid and on the account stated, though in form applying to the whole declaration. Would that circumstance have prevented the plaintiff from recovering the costs on the whole declaration?] The particulars had no mention of an account stated. Had they done so, the defendant would not have gone to trial at the hazard of the plaintiff's proving some acknowledgment. If the plaintiff could only recover on the first count the costs paid out of pocket, and the defendant paid the amount of them into court, how could the plaintiff go on to set up, under the last count, that the defendant had acknowledged a larger sum to be due? *Hurst v. Watkiss* does not apply; for the piece of evidence put in by the defendant, and of which the plaintiff seeks to avail himself in order to evade his particulars, is a mere claim of a sum for costs, and not evidence of an account stated, no balance having been struck. [*Lord Abinger C. B.* It is evidence thus far, that the defendant stated to other persons that the payment made by him to the plaintiff was for costs. *Parke B.* You say no case was made out by the defendant, (separate and apart from evidence given for the plaintiff by his attorney, which was disbelieved by the jury) so as to entitle the plaintiff to take advantage of the defendant's evidence according to *Hurst v. Watkiss*. *Alderson B.* The question is, whether the defendant was surprised at the trial, not by the use made of the last count, but by the nature of the demand itself.] The particulars delivered put the defendant on inquiring what costs had been personally incurred by the plaintiff, and the result showed that he paid enough into court on that account.

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LORD ABINGER C. B.—If this case turned only on the point made by my brother *Bompas* on the authority of *Hurst v. Watkiss*, that the defendant himself produced evidence for the plaintiff, I should hesitate to decide in his favour; for the paper put in by the defendant is at best ambiguous, and must be combined with testimony adduced for the plaintiff, (and which the jury disbelieved), in order to give effect to his argument. But the true question is, whether the defendant was really misled, either by that paper, or by the particulars delivered? As to the first, it is clear that the plaintiff's proof was confined to the amount of costs paid by him out of pocket, in *Fisher v. Guy*. As to the second, though the baron's order was for the particulars of the costs mentioned in the first count, the defendant could not be misled by the particulars actually delivered by the plaintiff; for they contained every item that could be proved on any count whatsoever. Nor does the plaintiff expressly abandon any count of his declaration. Had he stated in his particulars that he intended to avail himself at the trial of all and every count of his declaration, it could not be doubted but that that course was open to him; but I think those words surplusage. The defendant could not be misled, for the plaintiff's whole claim is clearly stated. The defendant might have been surprised at the trial, by the unexpected application of the paper he produced, to assist the plaintiff's claim to recover on an account stated: for he lay by to see that the plaintiff did not recover more at all events, on the first count, than the money paid into court: but as the evidence given would have been sufficient to prove that the defendant promised to pay the attorney's bill, he was not misled as to the amount of any claim the plaintiff intended to make. Informalities merely technical do not suffice to impugn bills of particulars, if they convey to the defendant substantial information

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of the nature of every claim which the plaintiff has to set up. *Parke B.* I assent to the rule laid down in *Hart v. Watkiss* (a), that the statement of the cause of action in a particular of demand, only precludes the plaintiff himself from giving evidence out of it, but does not prevent him from taking advantage of evidence, which, though given by the defendant for another purpose, also shows that the plaintiff was entitled to recover for a matter omitted in the particulars, though covered by the declaration; but I am of opinion, that in this case the evidence brought forward on the part of the defendant did not show that any account had been stated between him and the plaintiff, in which 11l. 14s. 6d., or any other sum, had been found due to the plaintiff; on this part of the case, therefore, he cannot succeed. Upon the other ground, I think the plaintiff is right, for I am satisfied that these particulars, though artificially drawn, did not mislead the defendant. The demand in the first particular is for 274. 8s. 6d., money paid to take up a bill at the defendant's request, and for interest thereon; and that would not comprehend the sum claimed by the first count. An order is afterwards obtained for a particular of the costs, charges, and expenses mentioned in the first count of the declaration, which particular was accordingly delivered; detailing the items of such costs, and also claiming the amount of a bill of exchange due 16th January 1835, and interest. Had it gone on to state that the plaintiff sought to recover the above sums, "on each and every count of the declaration" (b), it would have been quite clear; but I think this defendant must have un-

(a) 1 Campb. 68.

(b) See as to this *Sidways v. Todd and another*, 2 Stark. C. N. P. 408; *Wade v. Beasley*, 4 Esp. 7.

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stood to mean the same thing, and that the plaintiff did not intend to limit himself to the first sum in seeking to recover the sum claimed for costs. *But* he argued that the defendant was surprised, for that he must have supposed, from the form of the first count, that the plaintiff was seeking to recover in this action the amount of costs out of pocket only; but that argument vanishes when we find in the particulars delivered in pursuance of the writ that the sum was for the whole costs. I have no doubt but that the defendant well knew that the plaintiff was going for his whole bill of costs; and as there was sufficient evidence to warrant the jury in finding that the full amount of it was admitted by the defendant to be due, the rule must be discharged.

*BOURNE B.* The true test is, whether the plaintiff could be misled by the particulars furnished? I am of opinion that, though inartificial, they are not objectionable on that ground.

*ALDERSON B.* concurred.

*Rule discharged.*

*HUGH and Others against BOND, a prisoner.*

*THE* defendant was arrested on the 18th November last, and remained in the custody of the sheriff of Middlesex on the 15th April. On that day the declaration was filed in the office, with a rule to plead, and an affidavit of delivery of the declaration to the deputy-sheriff, and cannot afterwards treat it as merely irregular, so as to avail himself of it as a waiver of his own mistake in not demanding a plea before he signed judgment for want of a plea.

After signing judgment for want of a plea a plaintiff will be taken to have treated the plea as a nullity for all

poses, and cannot afterwards treat it as merely irregular, so as to avail himself of it as a waiver of his own mistake in not demanding a plea before he signed judgment for want of a plea.

of their bill of costs, and a notice of ~~the~~  
~~22d~~. On the 21st the defendant gave  
notice of his intention to move the court  
the judgment on that day; but not until  
till the 26th. The defendant swore to the  
plaintiffs' attorney to his belief that there was  
and that the application was made *veraxi*  
rule having been granted to set aside the  
all subsequent proceedings for irregular  
on the ground that there was no demand

*Curwood* showed cause. The judgment  
for this plea was a nullity. By No. 1,  
rules and regulations in Reg. Gen. *His*  
expressly directed that every pleading  
titled of the day when it was pleaded; and  
no other time or date. This being an  
of departure from the rule, affords the  
occasion for enforcing it. As to the  
demand of plea, that form was waived  
of an irregular plea; *Bond v. Smart*  
cited *Lockhart v. Mackreth* (b), and *Perr*

(a) 1 Chit. R. 735.

(b) 5 T. R. 861. A plea of *solvit ad diem*, though  
cause improperly entered, was held to operate as a  
then right to imparl, as it would have done if there had



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*Petersdorff* contra. The plaintiffs could not treat the plea as a nullity for one purpose, viz. enabling them to sign judgment for want of a plea, and then set it up again as being merely irregular for another purpose, viz. in order to show that as such, it was a waiver of a step which they were bound to take. The situation of the case is, in fact, as if no plea at all had been delivered. In *Dakins v. Wagner* (a) a plea was delivered without any date; but it was held that judgment could not be signed till the time for pleading was out, as within that time an amended plea might be delivered.

PARKE B.—*Perry v. Fisher* is an authority against the defendant, but is at variance in principle with the late cases of *Pepperell v. Burrell* (b) and *Macher v. Billing* (c) in this court. In *Perry v. Fisher* the rule to plead was irregular, being given before the delivery of the declaration, and the plea of non assumpsit in an action of debt was a nullity; yet it was there held to be a waiver of the want of a regular rule to plead. My brothers *Bolland* and *Alderson* agree with me in opinion that the principle of *Macher v. Billing* is similar to, and ought to prevail in this case, and that if a plea be treated as a nullity, it is so treated absolutely, and for every purpose. The case then stands as if no plea at all had been pleaded at that time on the 19th, when this plea was filed; in which situation of things this judgment could not have been signed.

Rule absolute.

(a) 3 Dowl. P. C. 535.

(b) 4 Tyr. 811.

(c) 4 Tyr. 812.

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In an action by the drawer against the acceptor of certain bills, payable at fixed dates, the plea was, that by agreement made between the plaintiff and defendant, contemporaneously with the acceptance of the bills by the latter, the payment of them was not to be required by the plaintiff, till he should recover in a certain action against a third person, or if he should not recover in it; and it was also averred that the plaintiff had not recovered in the action, and that the bills sued on were two of those drawn by the plaintiff as aforesaid:—  
Held, on demurrer, that the plea was bad, for not showing that the agreement for varying the absolute contract expressed on the bills was in writing; and, *semble*, for not denying the defendant's liability on any other contract with the plaintiff, besides that on the bills.

**ADAMS against WORDLEY.**  
**ASSUMPSIT** by the drawer against the acceptor of a bill of exchange for 45*l*, dated 29 December 1834, and payable six months after date, and upon another bill for the same amount, payable twelve months after date, between the same parties. Plea, that long before the making by the plaintiff, and the accepting by the defendant, of either of the said bills of exchange in the said declaration mentioned, to wit, on 23 January 1826, the defendant and *M. Gaitt* had made their certain joint and several promissory note in writing, and thereby the defendant and the said *M. Gaitt* on demand jointly and severally promised to pay to Messrs. *Wyatt and Sons* or their order 200*l* the value received, with interest at 5*l* per cent per annum from the date thereof, and which said promissory note the said *Wyatt and Sons* afterwards and before the making and accepting of either of the said bills of exchange in the declaration mentioned, to wit, on 31 October 1831, indorsed to certain persons using the name, style, and firm of Messrs. *Wyatt and Thompson*, and the defendant further says, that afterwards and before the making and accepting of either of the said bills of exchange in the declaration mentioned, to wit, upon the day and year last aforesaid, he the defendant paid to the said persons so using the name, style, and firm of *Wyatt and Thompson* as aforesaid, the said sum of money in the said promissory note specified, with the interest thereon at and after the rate aforesaid, and that they the said persons so using the name,

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style, and firm of Messrs. *Wyatt and Thompson* as aforesaid, then undertook and promised the defendant to re-deliver the said promissory note to him on request, but have hitherto neglected and refused so to do: And the defendant further says, that afterwards, and before and at the time of the making of the said bills of exchange in the declaration mentioned, to wit, on the 29th December 1834, two certain actions had been and then were pending in the Court of our lord the King before the barons of his said majesty's Exchequer, in one of which said actions the said plaintiff was the plaintiff, and the said defendant was the defendant, and in the other of which said actions the said plaintiff was also the plaintiff, and the said *J. Gaitt* was the defendant, and both of which said actions were commenced by the said plaintiff for the recovery of the said sum of money in the said promissory note specified, and which the plaintiff then claimed to be due to him as indorsee thereof, and such proceedings were thereupon had in both the said actions, that a question then arose and was then depending, whether the defendant or the said *J. Gaitt*, or either of them, was or was not liable to pay the said sum of money in the said promissory note specified to the plaintiff: And the defendant further says, that long before the making and accepting of either of the said bills of exchange in the said declaration mentioned, to wit, upon the same day and year last aforesaid, certain disputes had arisen and were then depending between the plaintiff and *M. A. Bingley*, as administratrix of all and singular the goods, chattels, rights and credits which were of *B. Bingley* deceased at the time of his death, touching and concerning a certain other sum, to wit, a sum of 300*l.* which the plaintiff then claimed to be due to him from the said *M. A. Bingley* as such administratrix as aforesaid, upon and by virtue of a

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certain other promissory note, of which the plaintiff was then the holder and indorsee, theretofore, to wit, on 10 *February* 1829, made by the said *R. Bingley* deceased in writing, and by which, the said *R. Bingley* deceased promised to pay on demand to one *G. Wye* or order, 500*l.* for value received, with interest at 4 per cent. per annum from the date thereof: And the defendant further says, that afterwards and at the time of making the said bills of exchange in the said declaration mentioned, and before the commencement of this suit, to wit, on 29 *December* 1834, the plaintiff was about to bring a certain action at law against the said *M. A. Bingley* as administratrix as aforesaid, to recover the said sum of money in the said last-mentioned promissory note specified: And the defendant further says, that afterwards and before the making of the said bills of exchange in the declaration mentioned, and before the commencement of this suit, to wit, on the same day and year last aforesaid, the defendant was indebted to *W. Cater*, *R. Marecock*, and *J. F. Green* as assignees of the estate and effects of the said persons so using the name, style, and firm of Messrs. *Wye and Thompson*, then being bankrupts according to the laws then in force concerning bankrupts, in a certain large sum of money, to wit, the sum of 117*l.* 6*s.* 6*d.* the said defendant and the said *J. Gaith* were discharged from all liability to the plaintiff upon the said promissory note so by them made as aforesaid: And the defendant further says, afterwards and before the commencement of this suit, and before the making and accepting of the said bills of exchange in the said declaration mentioned, to wit, on 29 *December* 1834 for settling the said actions so as aforesaid depending between the said plaintiff and the said *J. Gaith*, and between the plaintiff and the said defendant, it was agreed by and between the plaintiff on the one part

the defendant on the other part, that he the plaintiff should not proceed further in the said actions or any of them, so then depending in the said court as aforesaid, and that he the defendant should pay to the said *Wm. Smith*, then being attorney of the plaintiff in the said actions, the costs incurred by the plaintiff in the prosecution of the said actions respectively, and that the plaintiff should make and draw his three several bills of exchange upon the defendant, each for the amount of the sum of 45*l.*, one at six months, another at 9 months, and the third at 18 months after the date thereof respectively, and which said bills of exchange he the defendant should then accept and deliver to the plaintiff, and that he the defendant should pay to the plaintiff the said sum of 117*l.* 6*s.* 6*d.* due to the said *W. Cater*, *R. Morecock*, and *J. F. Groom*, as such assignees as aforesaid, if the defendant and the said *J. Gaitt* were not liable to pay to the plaintiff the said sum of money specified in the said promissory note so made by them the defendant and the said *J. Gaitt* as aforesaid; and that he the plaintiff should indemnify him the defendant from all claims and demands, action and actions, which the said *W. Cater*, *Morecock*, and *J. F. Groom*, as such assignees as aforesaid, might have upon him the defendant in respect of the said sum of 117*l.* 6*s.* 6*d.*, and that upon payment of the said costs, and of the said sum of 1*l.* 6*s.* 6*d.*, and upon his, the defendant, accepting the said bills of exchange so to be drawn by the plaintiff upon and accepted by the defendant as aforesaid, the defendant and the said *J. Gaitt* should be discharged from all liability to him the plaintiff, upon the said promissory note so made by the defendant and the said *J. Gaitt* as aforesaid, if he the plaintiff should recover in the said action so to be brought by him the plaintiff against the said *M. A. Bingley*, as such ad-

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ministratrix as aforesaid; and that until he the plaintiff should so recover, or if he the plaintiff should recover in the said action so about to be commenced by him the plaintiff against the said *M. A. Bing* such administratrix as aforesaid, that he the plaintiff should not require the defendant to pay any or of the said three several bills of exchange so made and drawn by the plaintiff upon and accepted by the defendant as aforesaid: And the defendant further says, that afterwards and before the commencement of this suit, to wit, on the said 29th *December* 1834, he the defendant did pay to the said *G. Smith*, so being the attorney of the said plaintiff in the said actions so brought by the plaintiff against the defendant, and against the said *J. Gaitt* as aforesaid, a large sum of money, to wit, the sum of 36*l.* and for the costs incurred by the plaintiff in the prosecution of the said actions respectively, and did also pay to the plaintiff the said sum of 117*l.* 6*s.* 6*d.* that he the plaintiff did then make and draw his several bills of exchange in writing upon the defendant, each for the payment of the sum of 45*l.*, and made one of the said last-mentioned bills of exchange payable six months, another of them 12 months, the third of them 18 months after the date of respectively, which said last-mentioned bills of exchange he the defendant then accepted, and delivered the same to the plaintiff, who then took, accepted, and received the said sum of 117*l.* 6*s.* 6*d.*, and the said last-mentioned bills of exchange, upon the terms agreed upon between the plaintiff and defendant as aforesaid: And the defendant further says, that afterwards, and after the payment by the defendant to the plaintiff of the said sum of 117*l.* 6*s.* 6*d.* as aforesaid, and to the said *G. Smith* of the said sum of 36*l.* as aforesaid, and after the said several bills of exchange

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was so made and drawn, and accepted and delivered to the plaintiff as aforesaid, to wit, on 7th February 1835, the said plaintiff did commence an action against the said *M. A. Bingley*, as administratrix as aforesaid, for the recovery of the said sum of money so claimed to be due to him the plaintiff upon and by virtue of the said promissory note so made by the said *R. Bingley* deceased, as aforesaid, and which said last-mentioned action was at the time of the commencement of the suit, and still is depending in the said court of our lord the king before the barons of his Exchequer, wholly undecided and undetermined: And the defendant further says, that the said plaintiff has not as yet recovered against the said *M. A. Bingley* as such administratrix as aforesaid, in the said last-mentioned action, and that the said bills of exchange in the said declaration mentioned are two of the bills of exchange made and drawn by the plaintiff upon and accepted by the defendant as aforesaid, and not other or different bills of exchange. Verification.

Demurrer, stating for causes, that the defendant in and by his said plea states, that before the making of the bills of exchange in the said declaration mentioned, it was agreed between the plaintiff and the defendant, that until the plaintiff should recover against the said *A. Bingley* in the said plea mentioned, or if the plaintiff should not recover against her, as in the said plea mentioned, the plaintiff should not require the defendant to pay either of the said bills of exchange so agreed to be drawn, and the defendant does not in and by his plea allege such agreement to be, or to have been in writing, and the defendant in and by his plea alleges a contract differing from and also inconsistent with the contracts contained in the said bills of exchange in writing in the said declaration mentioned, and seeks by such contract, so differing and being so

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inconsistent, to control, vary, and alter the contract contained in such bills of exchange, and yet does not allege or show such contract so differing from the being so inconsistent with the said contracts in the said bills of exchange in the said declaration mentioned, to be or to have been in writing. Joinder.

*Chandless* for the plaintiff, supported the demurrer. The plea is bad on the general demurrer, for not stating the transaction on which the defendant accepted the bill, and that there was no other consideration for it, except that particularly laid in the plea (a). The point arose in *Davis v. Holding* (b), but it was then unnecessary to decide it. As to the ground specially assigned, the agreement not to enforce the bills of exchange should have been stated to be in writing in order to exclude all reasonable intendment of any other state of circumstances in which the defendant would be liable. The plea is insufficient, because a written contract can only be varied by a written, and not by an oral contemporaneous contract. Had it been taken, the simple question for a jury would have been, whether or not there was such a contract as here relied on, without reference to the fact whether or not it was in writing. [*Parke B.* The modern cases in which the courts have refused to alter a written instrument by oral evidence of a contemporaneous agreement, are *Mosely v. Handford* (c), and *Foster Jolly* (d).] In every stage of pleading, after the declaration, the agreement by which it is sought to vary a written contract, should be shown to have been in writing, *Case v. Barber* (e). [*Parke B.* That case turned on the statute of frauds.] The rule of pleading

(a) See *Noel v. Rich*, 5 Tyr. R. 632.(b) *Ante*, 371.


(c) 10 B. &amp; Cr. 729.

(d) 5 Tyr. R. 239.

(e) T. Raym. 450; 1 Saund. 276 (d c); see 1 Coke's Rep. by Fra 5 p. 353, n. (B.); 1 Chitty on Pleading, 213, 458, 561, 4th ed.



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requires a greater particularity in the plea, because it reduces the general charge of the declaration to one specific point, which is all that can be afterwards traversed in the replication. One point insisted upon for the plaintiff in *Whittaker v. Mason* (a) was, that the plea set up matter which was not written in qualification of a contract laid in the declaration; and it appears from the judgment of the court, that had the declaration alleged that the contract insisted on by the plaintiff was in writing signed by the defendant, the court must have taken notice on the record, that the plea sought to vary the terms of such written contract by evidence of the usage of trade.

The Court here stopped *Chandless*, and called on

*Tyndale* to support the plea. The plea at its conclusion states, that the bills sued on are two of the bills made and drawn by the plaintiff upon, and accepted by the defendant as in the plea mentioned, and not other or different bills. [*Parke B.* It does not state that there were no other bills accepted by the defendant and held by the plaintiff, or that the defendant's liability on the promissory note was his sole liability.] As to the other point, *Alexander v. Gardner* (b), and *Goss v. Lord Nugent* (c), show that when the time for delivering goods is fixed by a written contract not under seal, it may, before any breach of it, or if the breach be waived, be extended by a subsequent oral agreement. [*Parke B.* You rely on having alleged in your plea a contemporaneous oral agreement.]

LORD ABINGER C. B.—The case of bills of exchange stands on grounds differing from that of contracts in general; as, for instance, those for sale of land or goods.

(a) 2 Bing. N. C. 359. (b) 1 Bing. N. C. 681. (c) 5 B. & Adol. 58.

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By the new agreement, the time at which the bills were to be paid was to be prolonged, but the contract contained in them was only to be dissolved conditionally, and in a particular event. They should have been deposited by the defendant in the hands of a third person while *Adams v. Bingley* was pending. The defendant is estopped from going into evidence to show that the time for payment expressed on the face of them was altered by the agreement mentioned in the plea. A collateral contract for putting an end to a bill, and giving it up to the acceptor, is a species of satisfaction, and consistent with its terms (a); whereas this plea sets up a contract for varying the period at which these bills were payable, which we cannot enforce on these pleadings, without disregarding decided cases.

PARKE B.—The parol agreement set up by the defendant, seeks to postpone the period for payment of the bills, till *Adams v. Bingley* should be decided: the effect of which would be to make their payment contingent on that event, and to alter the absolute engagement made by the bills. The plea is bad on that account.

The other Barons concurred.

Judgment for the plaintiff.

(a) *Walpole v. Pulteney*, Doug. 367; *Pike v. Street*, M. & M. 226; *Thompson v. Clubley*, ante, 482.

THE KING *against* The Sheriff of ESSEX, in a Cause  
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FITCH sued *Courtenay* in debt for goods sold, and arrested him on the 12th *June*, the last day of last Trinity term. Bail was given to the sheriff, but special bail were not put in in due time, and a declaration *bene esse* was filed on the 20th *June*, venue *Essex*. On the 23d, being in vacation, the sheriff was ordered by a baron to return the *capias* in six days; on the 26th notice was given of special bail having been put in but without notice of justification; and the defendant pleaded *nunquam indebitatus*, which plea was returned on the 26th *June*, he not having appeared or perfected bail. The attachment in this case had been obtained on the 3d of *November*, returnable on the 10th, on the affidavit of the plaintiff's attorney, that he had reached the office on the 30th of *June* in the morning (not stating the hour), for the return of the writ of *capias*, in order that, if found, he might rule the sheriff bringing in the body, but that no such return being made "pursuant to the baron's order," he was prevented from obtaining a rule to bring in the body or proceed with the cause, and therefore, on the 3d *November* last, *Jervis* for the plaintiff obtained leave to issue an attachment, returnable on the 7th (a). See *Reg. v. M. 3 W. 4. No. 13.* The plaintiff's attorney swore that he had the bail justified and the defendant pleaded that he should have joined issue, and given notice of that at the *Essex* assizes on the 30th *July*, and that

The defendant had died on the 6th *September*, after which three summons for entering an exoneretur on the bail-piece, and for delivering up the bail-bond to be cancelled, were opposed by the plaintiff's attorney, and argued at chambers, with costs, before *Michaelmas* term.

Had a writ of *capias* in proper time, he should, if in vacation, give him notice of detention, and will then be entitled to recover all such damages as occur between giving such notice and receiving information from the sheriff that the defect is

An attachment having issued against a sheriff, for having by mistake omitted to return a *capias*, pursuant to a baron's order in vacation, under *Reg. Gen. M. 3 W. 4. No. 13.* till half an hour after the opening of the office on the day after the proper return day, the court set it aside, though bail above were not perfected, on payment of costs and of such further damages, if any, as the master might find the plaintiff to have sustained from the sheriff's omission.

A sheriff may move to set aside an attachment against him, after it has issued to the coroner.

Where a plaintiff intends to make a sheriff liable for damages occasioned by his not having

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the plaintiff lost a trial from the sheriff's default in not returning the writ. On the 11th *November*, in *Michaelmas* term, *Platt* obtained a rule to show cause why an attachment issued against the sheriff of *Essex* for not returning the writ should not be set aside with costs. It appeared by the affidavit of the clerk to the *London* agents for the sheriff, that on 22d *June* 1835, they received from the plaintiff's attorney a copy of a baron's order calling on the sheriff to return the *capias*. The agent wrote to the sheriff's officer employed to execute the writ, and having received instructions from him, on the 29th, being the last day for filing the return in the Exchequer office, the clerk prepared the return of *cepi corpus* with the intention to file it; but from mistake, and without collusion with the defendant or his bail, or the sheriff's officer, or intention to disobey the baron's order, the agent's clerk omitted to do so till half-past eleven on the morning of the 30th, being half an hour after the opening the proper office for filing returns. The affidavit stated the motion to be really made on the part of the sheriff at his own expense, and for his own indemnity only, and without any collusion with the defendant, or his bail, or any other person.

*J. Jervis* supported the attachment on the ground that there had been a default to return the writ. But first, he objected that the motion had come too late, being after the attachment had issued to the coroner. The court overruled this objection. He then urged that the attachment must stand, no bail having yet justified, and that his affidavit showed that the plaintiff repudiated the bail. Had not the defendant prevented the plaintiff from trying his cause on the 20th *July*, he might have had immediate execution, and secured payment of his debt.

*Platt* supported the rule. The plaintiff sustained

no damage from the return not being made at the last moment of the 29th *June*, or till half an hour after the opening the office on the 30th. The affidavit on the other side is only that no return was filed "*pursuant to the baron's order*," and does not say that it was not actually filed before the search was made, or that the deponent did not on his search see a return there made on the 30th. The plaintiff does not object to the sufficiency of the special bail, for he has not called on them to justify, and contends that they are bail in the cause, and cannot be exonerated. [*Alderson B.* That is no more than saying they shall not be exonerated till the plaintiff sees whether he can fix the sheriff.] *Reg. Jen. Mich. 3 W. 4. No. 13.* provides that an attachment shall issue forthwith for disobedience of a judge's order made in vacation to return a writ, whether the thing required by such order shall or shall not have been done in the meantime. [*Parke B.* Is there any case since the new rules to show that a plaintiff waives his right to an attachment against the sheriff by staying proceedings against bail? Can the plaintiff proceed against the sheriff after bail above have been actually put in and not excepted to? *Alderson B.* The attachment would be regular, but set aside on better terms.] Taking the return of the writ as not duly made, the defendant, by opposing the exoneretur of the writ, adopted them, and cannot now proceed against the sheriff.

*Per Curiam.*—The rule for setting aside the attachment must be absolute, on payment of costs, and of any further damages, if any, as the master may find against the plaintiff to have sustained by reason of the sheriff's omission to return the writ before the 30th of *June*. The costs of the reference to be in the discretion of the master, and further proceedings to be staid in the meantime.

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The master's report having been now moved for was read. It stated that the plaintiff's proceedings were regular and the debt due, but that the plaintiff had not sustained any further damages by the sheriff's omission to return the writ before 30th *June* last; and that each party should pay his own costs of the reference. It assigned the master's reasons for so reporting.

*J. Jervis* objected to the report, and moved to refer it back to the master to inquire what was due to the plaintiff, by reason of the sheriff's default in not returning the writ. This reference was by order of the court; but even if it had been by consent, the master, having stated his reasons on the face of the report, had made it like an award, which may be impugned for defects on the face of it. The goods were swept under a fraudulent execution, so that the debt was lost; but had the defendant lived till *Michaelmas* the plaintiff would still have had his personal security as well as that of the attachment against the sheriff.

*Platt* supported the report. [*Alderson* B. The calculation of damages by the master was to turn on the point, whether or not the plaintiff's attorney had given notice to the sheriff of his intention to proceed against him, by way of attachment, for the intermediate damages incurred by his neglect to return the writ the proper day. Whether he could have given the notice must, in this case, depend on whether he knew it himself before the 30th *June*. It was referred to the master to decide what chance there was at any time of the plaintiff's getting the fruits of his judgment, and cannot differ from the report in the negative.] The defendant's whole property had been exhausted by execution before the arrest in this action, so that at his death in *September* this plaintiff's only remedy was to try to fix the sheriff.

LORD ABINGER C. B.—I see no reason for disturbing the master's report.

PARKE B.—I agree with what my brother *Alderson* has suggested, that a sheriff ought not to be called on to pay damages, unless, as soon as the plaintiff discovers the irregularity, he gives some notice to the defendant, that he means to proceed against him. Of course the sheriff would be liable to pay the costs of that notice.

ALDERSON B.—I am of the same opinion. It seems to me that we ought to assimilate the practice in vacation to that in term, and that in so doing we shall effect the purposes for which the rule was framed. The plaintiff therefore, if he means to make the sheriff liable for intermediate damages, must in vacation give notice to that effect to the sheriff, as he would do, if in term, by a rule for an attachment; and he then ought to receive such damages as occur after such notice, and up to the time when he receives notice from the sheriff that such defect has been cured. The expense of the notice to the sheriff will be part of the costs of any attachment obtained in the subsequent term. By this course every such question as that now raised and referred to the master will be avoided.

*Per Curiam*.—The rule for referring it back to the master was not drawn up, as it should have been, on reading the master's report, but the report having been read before it was granted, the rule must be discharged without costs.

See 3 & 4 W. 4. c. 67. s. 2; and *Kemp v. Hyslop*, ante, 77.

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JONES *against* NANNEY.

In an action of *indebitatus assumpsit* for work and labour and money paid, defendant pleaded that the work and labour was done under an agreement between the plaintiff and defendant, that the plaintiff should bestow his work and labour in endeavouring to secure the defendant's return as a member of parliament, without being entitled to demand of or from him in respect thereof any remuneration, except such sums as the plaintiff should disburse in and about that object; and that there was no agreement between them relating to the amount of the remuneration to be received by the plaintiff from the de-

**A**SSUMPSIT for work and labour as an attorney, and for certain fees due and of right payable to the plaintiff, in respect of his retainer, and for money paid and due on an account stated. Second plea, as to the breach of promise in the declaration, so far as the same relates to the non-payment by the defendant to the plaintiff of the sum of 2000*l.* in the declaration firstly mentioned (except the sum of 90*l.* parcel thereof) and of the said sum of 150*l.* in the first plea mentioned, in the manner therein mentioned, that the said work and labour, care, diligence, and attendance of the plaintiff in the declaration mentioned, were done, given, and bestowed for and on behalf of the defendant on two several occasions, and the former of which occasions was A. D. 1832, and the latter A. D. 1834; and on each of which occasions he the defendant became and was a candidate for the representation in the Commons house of parliament of certain boroughs called and known by the name of the *Carnarvonshire* boroughs, and the said work and labour, care, and diligence were done, given, and bestowed in and about the endeavouring to secure, and in and about the endeavouring to promote the return of the defendant as a representative of and member for the said boroughs in the said house of parliament, and for no other purpose and on no other occasion whatsoever; and the defendant further saith, that the said work and labour, care, diligence and attendance of the plaintiff, so far as the same relates and related to the first of the said occa-

but that a fair remuneration for the plaintiff's labour would not exceed 90*l.*, (as to which the defendant had pleaded payment into court.) Held, on special demurrer, that the plea was bad, as amounting to the general issue. *Semble*, the special agreement might be given in evidence on the general issue non assumpsit.



was, were done, given, and bestowed by the plaintiff under and by virtue and in pursuance and in consequence of a certain agreement theretofore, and before the plaintiff had done, given, or bestowed the said work and labour, care, diligence and attendance, or any part thereof, or had been or was retained by the defendant for that purpose, to wit, on the 1st day of September 1832, made, entered into, and concluded on that behalf by and between the plaintiff and the defendant, which said agreement was and is to the effect following; that is to say, that he the plaintiff should do, give, and bestow the work and labour, care, diligence, and attendance of him the plaintiff, in and about the endeavouring to secure, and in and about promoting the return of the defendant as a representative of, and member for the said boroughs in the said house of parliament, on the first of the said occasions, without being or becoming entitled to have, receive, or demand of or from the defendant, in respect thereof, any fees, money, or remuneration whatsoever, but that the plaintiff should be entitled to have, receive, and demand of and from the defendant on such occasion such sums and monies only as he the plaintiff should disburse, pay, lay out, or expend for or on behalf of the defendant in and about the endeavouring to secure, and in and about the promoting the return of the defendant as a representative of and member for the said boroughs in the said house of parliament on the first of the occasions as aforesaid; and the defendant further saith, that but for the said agreement he the defendant would not have retained or employed the plaintiff to do, perform, give or bestow his said work, labour, diligence and attendance, so far as related and relates to the first of the said occasions or any part thereof; and the defendant further saith, that there was not at any time any express contract or agreement made

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or subsisting by or between the plaintiff and defendant, touching or relating to the scale, rate, or amount of the fees, money or remuneration to be had, received, or demanded of or from the defendant, and to be by him payable and paid to the plaintiff for or in respect of the said work and labour, care, diligence, and attendance of the plaintiff by him done, given, and bestowed as in the declaration mentioned, so far as the same related and relates to the last of the said occasions; and the defendant further saith, that the said work and labour, care, diligence, and attendance of the plaintiff in the declaration mentioned were not wholly or in part done, given, or bestowed in, about, touching, or relating to any suit or suits or other proceedings whatsoever in any court of law or equity, but the defendant further saith, that a fair, reasonable, and proper remuneration to the plaintiff for and in respect of the said work and labour, care, diligence, and attendance of him the plaintiff in the declaration mentioned, so far as the same related and relates to the last of the said occasions, together with all fees due or payable in respect thereof, did not at any time, and does not exceed the said sum of 90*l.* parcel &c. in the introductory part of this plea mentioned. Verification.

Special demurrer to the second plea; showing for cause that it does not either sufficiently confess and avoid, or traverse and deny that part of the declaration to which it professes to be an answer. And for that the defendant does not in or by that plea admit even a colourable right of action in the plaintiff in respect of the causes of action set forth in the declaration, and to which the said second plea is addressed, and for that the matter of the said second plea amounts only to the general plea of non assumpsit, and therefore tends to great and unnecessary prolixity of pleading; with other causes not material to be stated. Joinder.

*Cowling* in support of the demurrer. The plea does not sufficiently traverse or confess and avoid the declaration. It amounts to the general issue only, viz. that except as to a particular sum provided for by a previous plea, there was no promise to pay for the work and labour. [*Parke B.* It does not appear on this plea what has become of the 90*l.*, the money disbursed by the plaintiff out of pocket (*a*). The plea divides the case into two transactions. The question is, whether the 90*l.* was to be sued for as money paid by the plaintiff to the use of the defendant at his request, or whether the payment by the defendant of the money out of pocket was to be the reward for the plaintiff's work and labour.] The court here called on

*J. Jervis* to support the plea. The object of the plea was to get the opinion of the court whether this could be given in evidence on the general issue, which is doubted. The defendant admits the work done, but asserts that it was done under a particular agreement not to pay more for it than the expense out of pocket. That is a sufficient confession and avoidance. *Parke B.* No such facts are here apparent as would raise an implied promise by the defendant to pay; and the plea denies all such.] *Edmunds v. Harris* (*b*) is an authority to show that in an action of *indebitatus assumpsit* for goods sold to be paid for on request, the defendant cannot upon the general issue give evidence that the goods were sold on a credit not yet expired.

**LORD ABINGER C. B.**—The plea is bad, for by insisting on a special contract, it rebuts the implied promise in the declaration, and thus amounts to the general issue.

(*a*) The first plea was not stated on the demurrer book, in consequence of *Reg. Gen. M.* 9 *G.* 4. 2 *Y.* & *J.* 530.; but upon statement of counsel, was taken to be a plea of payment of the 90*l.*

(*b*) 2 *Adol. & Ell.* 414.

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*Taylor v. Hilary* (b), and *Cousens v. Paddo* court of Common Pleas disregarded it in *A Gardner* (d), and it may be now considered ruled. All the facts pleaded are matter of show that no promise to pay the money sued be implied. The plea therefore amounts to a legal issue.

The other barons concurred.

Judgment for the

(a) Decided this term. See post, Part 5.

(b) 5 Tyr. R. 375.

(c) 5 Tyr. R. 542.

(d) 1 Scott, 281; 1 Bingh. N. C. 671, S. C.; and see 5 T.

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#### GOODCHILD *against* PLEDGE.

A plea of payment must conclude with a verification.

A PLEA of payment concluded to the  
Held, on special demurrer, that as it  
new matter, it ought to have concluded to the  
*Ansell v. Smith* (e).

Leave to

*Mansel* supported the demurrer; *Ogle* th

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PORTER against IZAT.

**ASSUMPSIT** on a charter-party of affreightment, dated 24th September 1833, between the defendant therein described to be owner of the *Margaret Thompson*, of the one part, and the plaintiff therein described as merchant and freighter of the said vessel, of the other part: It was witnessed that the said vessel being of the burthen of 272 tons per register, or thereabouts, and then laying in the port of *Hamburgh*, and being tight, staunch, and strong, and every way fitted for the voyage, should, in the course of *November* then next, set sail and proceed to *Valparaiso*, the intermediate ports, and *Lima*, and having discharged her outward cargo, which was to form no part of that charter-party, should forthwith be made ready and proceed to *Costa Rica*, and there receive and take on board from the said freighter, in the usual way, a full and complete cargo of wood or other lawful produce, not exceeding what she could reasonably stow and carry, over and above her cabin tackle, apparel, provisions, and furniture, and being so loaded, should therewith proceed to *Liverpool*, and there deliver the same agreeably to bills of lading, and so end the voyage (restraints of princes, &c. &c. always excepted). [The rest of the

A plea can only be applied to the breach of contract alleged, and not to the special damage laid as resulting from such breach. Thus a breach that a ship, when she sailed on a voyage, was not tight, staunch, strong, or fitted for the voyage, and though she set sail on the voyage, yet by reason of her not being so tight, &c., when she so sailed, was afterwards obliged to put back, and did put back and go to a port named, and was, by reason thereof, detained at *Altona* for a long time; and although she

did not set sail, and proceeded on her voyage, yet she did not proceed on it according to the due course thereof &c., or with the dispatch which she ought to have used &c. means of which several premises the plaintiff sustained the loss of a homeward voyage, is not answered by a plea that, as to so much of the declaration as relates to the ship being detained in the port named, beyond the time necessary and requisite to discharge the ballast on board, she was not detained there "by reason of her not being tight &c." Nor can a plea confess the whole of a breach alleged, and then offer to pay into court a sum in satisfaction only of a part first described in the plea, and not of the whole consequences of the detention alleged in the declaration by way of special damage. Thus, a plea of payment of one shilling into court as to so much of a declaration as related to the vessel not being fitted for the said voyage, and by reason thereof being obliged to put back, and go to a port named, and being detained there a short time, that is to say, "such time as was necessary and requisite to put a further quantity of ballast on board thereof," was held bad, even if the detention and delay &c. amounted to a breach, or were more than special damage. *Semble*, it is also bad, for setting up to answer what was not alleged in the declaration.

prince or princes, ruler or rulers, or any d  
seas or navigation, fire, pirates, or enemies  
her from so doing: nor was the said vess  
month of *November* 1833, nor was she  
afterwards until she sailed on the said voya  
after mentioned, nor was she when she  
the said voyage, to wit, 20 *December*  
staunch, strong, or in any way fitted for t  
age, although no restraint, &c. (as before) p  
from so being: and although the said sh  
did, to wit, on &c., sail and proceed on  
age, to wit, from the port of *Hamburg* a  
the said ship or vessel, by reason of her no  
staunch, strong, and fitted for the said voy  
said, when she so sailed upon the same as a  
afterwards, to wit, on &c., obliged to put b  
put back and go to a certain place, to wit,  
was by reason thereof detained at *Altona*,  
a long time, to wit, until 20 *January* 18  
though the said ship or vessel, to wit, on  
year last aforesaid, did again set sail and  
said voyage, to wit, from *Altona* aforesaid,  
not proceed on the said voyage in and  
the due course thereof, nor with the dispat  
ought to have used according to the said c

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voyage, and unnecessarily and improperly deviated from the said voyage, and from and out of the course thereof, and went to divers other ports and places not in the course of the said voyage, and for purposes other than the purposes of the said voyage." The declaration then proceeded to allege, that the ship not proceeding according to the due course of the voyage, and the want of dispatch &c. were not occasioned by restraint of princes &c.; and that by means of the premises the ship did not arrive at *Lima* till long after she reasonably might, and otherwise would have arrived there, and did not arrive till &c. (the date when she so in fact arrived); and by reason of the said several premises the plaintiff was prevented from loading and shipping by the said ship a certain cargo, and lost the benefit of a certain other charter-party under circumstances stated in the declaration.

Several pleas were pleaded, of which the third and fourth were as follows:—Second plea, to so much of the declaration as relates to the vessel not being tight, staunch, and strong, says, the ship was tight &c., conforming to the country. The third plea, as to so much of the declaration as relates to the vessel not being fit for the said voyage, and by reason thereof being obliged to put back and go to the said place called *Altona*, and being detained there for a short time, that is to say, such time as was necessary and requisite to put a further quantity of ballast on board thereof, was a plea of payment of one shilling into court, averring that the plaintiff had not sustained damages to a greater amount than the sum of one shilling in respect of the said cause of action in the introductory part of this plea mentioned. And thereon, that the plaintiff had sustained further damages.

The fifth plea was as follows: The defendant, as to so much of the said declaration as relates to the said

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vessel being detained at *Altona* beyond the time necessary and requisite to put the said ballast on board, says that the said vessel was not detained there by reason of her not being tight, staunch, and strong, and every way fitted for the said voyage, in manner and form as the said plaintiff hath in his said declaration alleged; concluding to the country.

Special demurrer to that plea, showing for causes that the defendant, in and by the said fifth plea, denies and traverses matter which is not traversable, and which is only special damage; and that he also traverses and denies what is not alleged in the said declaration, namely, the fact of the said vessel being detained at *Altona* beyond the time necessary and requisite to put the said ballast on board, by reason of her not being tight, staunch, and strong, and every way fitted for the said voyage; and that the defendant introduces new matter into the said fifth plea, to wit, the said matter as to the said vessel not being detained beyond the time necessary and requisite to put the said ballast on board, by reason of her not being tight, staunch, strong, or fitted for the voyage, and other new matter: and yet the fifth plea concludes to the country instead of a verification: and that it does not appear by the fifth plea, or by the said declaration, that the said ship took in any ballast at *Altona* aforesaid, and for that it admits the breach alleged in the declaration as to the ship not being tight &c., and gives no answer thereto, and that it is no answer to the said detaining for the said time in the said fifth plea mentioned. That such detaining beyond the time for taking in ballast was not occasioned by the said ship not being tight &c., inasmuch as if the first returning and the putting back to *Altona* was occasioned by the said ship not being tight &c., the defendant would be liable for the subsequent detention, even if arising from stress of weather; and that the fifth plea is argumentative in stating that the



said ship was not detained by reason of not being tight &c., as an answer to the said breach or any part thereof, and that the said traverse and denial is too large, as if the said ship was detained by her being either not tight, nor staunch, nor strong, or not fitted for the voyage, the said plea would be no answer to what it professes to answer, and the said plea ought to have negatived each of these facts; and also, for that it tenders an immaterial issue, and that no material issue can be joined on the fifth plea; and that the fifth plea is in other respects vicious, argumentative, wrongly concluded, and double.

Joinder in these terms: and the defendant says that the plea to so much of the declaration as relates to the vessel being detained at *Altona* beyond the time necessary and requisite to put the ballast on board, and by the plaintiff in his demurrer, erroneously called the fifth plea, is sufficient in law.

*Crompton* for the plaintiff supported the demurrer. What the plaintiff insists to be the fifth plea, tenders an issue which he could not take issue on, for only the special damage is traversed by it. He contends that the detainer of the ship at *Altona* happened by reason of her being obliged to put back and go into that port, viz. on account of her not being tight and fitted for the voyage. That, viz. the going into *Altona*, is the breach of contract which may be traversed; the rest is damage only, which cannot. Thus, in *Smith v. Thomas* (a), *Tindal* C. J. says, "The plea must be an answer to the action; there is no such thing as a plea to the damages." Now, the matters here traversed are mere damages arising from the breach, and so not traversable. If the special matter was traversable, more should have been traversed, *e. g.*

(a) 2 Bing. N. C. 378; Com. Dig. tit. Pleader (G. 12.) In trespass for chasing cattle, *ita quod*, &c., a traverse of what followed *ita quod* was held bad, *Leach v. Widsley*, 1 Lev. 283. 1 Vent. 54.

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what took place in *America &c.*, but that would not have answered the declaration at all. The plaintiff has not alleged there that the ship was detained longer than for putting in ballast. It is not like one plea, for it is pleaded to distinct parts of the declaration, and introduces fresh matters. [*Parke B.* The plea should have been applied to the breach that the ship was not tight &c.] It was inconvenient to enter a *nolle prosequi*, because it would have included part of the special damage. [*Parke B.* You say that the ship's not being tight, strong, and fitted for the voyage, has had the consequence of delaying her whole voyage, by occasioning her to go into and be detained at *Altona*. *Alderson B.* The plea divides "fitted for the voyage" from "tight and strong," admitting that the ship was not tight and strong, and that she went into *Altona*, but says that the damage arising not from all, but a part only of her detention there, is one shilling only.] That this is a plea to the damage only will appear from this consideration, that if all of it, including the latter part, had been traversed, the cause of action set up by the breach will remain unanswered; whereas, had the plea negatived the ship being strong &c., that being, as the plaintiff contends, the true breach, the action would be answered as to that breach. If the result of the breach is negatived at all, the whole should have been negatived, viz. the not arriving in *America &c.*

Secondly, the fifth plea is bad for assuming to traverse what is not alleged in the declaration (a); viz. by averring that the vessel was not detained at *Altona* beyond the time necessary for putting on board the said ballast (viz. that mentioned in the fourth plea), and that she was not so detained by reason of her not being tight &c. [*Parke B.* Her "going into" *Altona* to get ballast did not necessarily occasion her "detention" there; that might be occasioned by her getting into a

(a) See *Bishop v. Evans*, 5 Tyr. R. 638.

port of ice-trap there ; but neither plea states that there was no other special damage besides that mentioned in the introductory part.] *Crompton* was here stopped by the court, who called on.

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*Martin* to support the plea. The first breach, that the ship did not sail on the voyage, the second that she was not tight &c., the third that by reason of the ship not being tight &c., she was detained in *Altona*. The matter following the words "and although" was meant to begin a further breach founded on the contract to proceed on the voyage from *Hamburg* to *Lima*: nor does the special damage begin till the statement, "that by reason of the said several premises, the plaintiff was prevented from loading a cargo, and lost the benefit of another charter-party, &c."

Lord Abinger C. B.—Your proper plea would have been, that, as to the detention at *Altona*, and the other consequences thereof, you had paid so much money into court. The question would then have been, whether the amount paid in was sufficient. At present the plea is only directed to such short time as was necessarily occupied in putting into *Altona* for more ballast, and supposing her to have been detained there three months for want of sufficient ballast, how could that be answered by this plea?

PARKER B.—The last part of the breach is not answered. Though the fourth plea admits the fact of the ship putting back to *Altona*, by reason of not being tight &c., and being detained there for a short time, viz. such time as was necessary to put more ballast on board, yet the sum paid into court is so limited by the pleas as to answer only a part of the consequences laid in the declaration by way of special damage, arising by reason of such detention. It confesses a part of the second breach, but does not in a legal sense avoid it, and offers satisfaction only as to a part. What is now argued

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to be a third breach is no breach at all. It is only an allegation of special damage, repeating the consequence of the second breach, viz. that the ship was not tight, strong, &c. After admitting that she was not tight, strong, &c. the defendant should have paid into court a sum sufficient to cover the whole damages arising from the loss of the voyage, &c. which were the consequences of that admitted breach of contract. The second ground of special demurrer is decisive against the plea.

ALDERSON B.—I agree with my brother *Parke*, that the second ground of demurrer must prevail. The words “by reason thereof” are equivalent to “in consequence of” what preceded them. The defendant may amend on paying into court such a sum as he shall be advised is sufficient to answer the damages arising from the whole necessary detention of the ship, as well as the loss of her voyage, and the whole consequences of her being obliged to put into *Altona*, on account of her not being tight, &c. The fourth plea should be also amended.

Amendment permitted accordingly.

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HUTTON *against* WARREN, Clerk.

An outgoing tenant claimed an allowance from his land-

**A**SSUMPSIT. The declaration stated, that whereas the plaintiff, on 25th *March* 1831, became and was lord under the custom of the country for labour bestowed in tilling and sowing a certain portion of the land within the last year of his tenancy. The outgoing tenant had held the land for several years after the expiration of a lease, without coming to any fresh agreement. The lease contained a covenant by the tenant to spend and consume on the demised premises three parts out of four of the straw arising from them, and to leave the manure there at the end of the term to and for the use of the lessor, he paying the full price for the same. Held, that the tenant must be taken to have held under the terms of the expired lease as far as they were applicable to a tenancy from year to year; and that the stipulation in it, as to leaving the manure at the end of the term, did not exclude parol evidence of the custom of the country allowing the outgoing tenant for the tillages and sowing claimed; and that that custom was imported into the lease by implication.

ant to the defendant, then being rector of the parish *Wroot*, of a certain farm, glebe land, premises, and es, with the appurtenances, situate in the said parish *W. &c.*, upon, among other things, the terms and ditions following; that is to say, upon the terms and ditions that he the said plaintiff, his executors, administrators, or assigns, should and would, during the tenancy, manage, till, sow, and cultivate the said and glebe lands in a husbandlike manner, according to the custom of the country where the same were ate, and that the defendant should, after the expiration of the said tenancy, make and pay to the said tiff all such reasonable allowances as the plaintiff, as oing tenant of the said farm &c., should, according he custom of the country where the said premises situate, be entitled to receive of and from the defendant, in respect of any tillage, sowing, or cultivation e said farm &c., or any part thereof, according to custom of the said country, by the said plaintiff ng the said tenancy; (mutual promises). Averment, the plaintiff, confiding &c., remained and continued tenant as aforesaid for a long time, to wit, from ce until 25th *March*, 1834, when the said tenancy duly determined and ended by a notice to quit a by the defendant to the plaintiff: that during continuance of the tenancy, to wit, on the 1st of *uary* 1833, and on divers days between that day the determination of the said tenancy, he the plaintiff, according to the course of good hus- ry in tilling, sowing, and cultivating the said farm lands, according to the custom of the country e the same was situate, bestowed his work and ar, and used divers quantities of seeds and corn in about the sowing of divers parts, to wit, ten acres e said farm, with barley &c. &c., and also be- ed his labour in and about the cultivating of the

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piration of the said tenancy, became and  
going tenant of the said farm, entitled  
himself of and from the defendant certain  
and customary allowances, in respect  
sowing, and cultivation of the said  
lands as aforesaid, amounting together  
to wit, 99l. 7s. 6d., whereof the defendant  
notice: "Yet the defendant disregarded  
and did not then or at any other time  
the said plaintiff any of the said custom  
according to the said custom of the  
said promise and undertaking he ought to  
Plead: first, non assumpsit: secondly, as  
was not tenant of the defendant of the  
land, premises, and tithes, with the upput  
the terms and conditions in the said deed  
behalf mentioned: thirdly, that the plaintiff  
to the course of good husbandry, and in  
or cultivating the said farm and lands, as  
custom of the country where the same were  
not bestow his work or labour, or time  
in or about the sowing of any part of the  
barley &c., or other seeds, or bestow his  
about the cultivating of the said barley:  
that, according to the custom of the  
plaintiff, after the expiration of the said

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sowing or cultivation of the said parts of the said lands as aforesaid. Issues thereon.

At the trial before Gaselee J. at the last *Lincolnshire* assizes, it appeared that the defendant became rector of *Wroot* in *October* 1832, on his father's resignation in his favour; and that the plaintiff had been tenant of the rectory, farm, glebe and tithes, from 1811 till 1834, at the same rent. The plaintiff proved a notice from the defendant, dated 14th *September* 1833, calling on the plaintiff to quit at *Lady-day* 1834, and another notice from the defendant, dated 31st *October* 1833, cautioning the plaintiff against neglecting to cultivate the land in due course of husbandry. The state of cultivation in which the farm was, when he quitted it on *Lady-day* 1834, was then shown to be good, and the custom of the country as to the allowances due to an outgoing tenant for tillages and sowing a proper proportion of his lands were proved. It was sworn, that by the custom a tenant was bound to leave the manure if the landlord would purchase it. The value of the seed and labour actually found and bestowed in 1833, were shown to be 95*l.* 7*s.* 6*d.* The succeeding tenant was shown to have taken the blend corn, barley, and clover sown by the plaintiff in 1833 and 1834, according to the course of good husbandry in *Wroot*. The defendant then opened his case by putting in a counterpart of an expired lease which had been granted to the plaintiff in 1811 by the defendant's predecessor in the benefice, at 350*l.* a year for six years (a). It was in the usual form, containing a covenant by the tenant to spend and consume on the demised premises three parts out of four of the straw arising from the glebe and tithes, and leave the manure at the end of the term


(a) An objection was made to its reception in evidence, on the ground that it was only stamped with a 20*s.* stamp instead of a 3*l.* stamp; 55 C.3. c. 184, tit. Lease; *Turner v. Power*, 7 B. & Cr. 625.

manure left on it, or for the seeds, sowing, it by that outgoing tenant; but this evidence contradicted by the plaintiff's producing a receipt from the tenant for money expressed to be paid to him for the same items by the plaintiff. Some evidence was also produced to show, that on glebe land seed and labour usually paid for by an incoming to an outgoing tenant. The jury found a verdict for the plaintiff for the amount of the whole custom claimed; subject to leave to move to enter a new verdict on the ground that the lease operated to extinguish any right of the plaintiff to allowances as tenant by the custom of the country, and that the manure, stipulated for by its terms. He obtained a rule,

*Humfrey and Waddington* showed cause, and relied on by the defendant expired long before the relation of landlord and tenant began between the parties, viz. in 1817, since which the incumbent of the living, it has resigned the living. The plaintiff is, therefore, at two degrees from any presumption of holding from year to year, subject to the terms of which distinguishes this case, from *Roe v. Ward (a)*, where the lessee of a tenant, who was held over for two years after his lessor di-



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of fact for the jury, whether a new agreement offered by the defendant's letter had not been accepted by the plaintiff, so that there cannot be a nonsuit. However, assuming the lease to be applicable, it is silent in respect to that part of the custom of the country on which the plaintiff relies; and the real principle is, that parol evidence of the customary rights of outgoing tenants in a particular district may be admitted, unless excluded by the express terms of a lease, or by necessary implication from them. See *Senior v. Armytage* (a). It never could be the intention of the parties to the lease to exclude the custom altogether, for that would be to dispense with his sowing the land in the last year of the tenancy, on the faith of receiving the customary allowances. *Webb v. Plummer* (b) does not apply. The outgoing tenant there claimed foldage under the custom of the country as to *Southdown* farms, but had covenanted by lease to fold the flock in a specified manner, and to carry manure under direction of the landlord or incoming tenant in the last year of his term. The incoming tenant was to pay his predecessor for fallowing and carrying out the dung, but not for the dung itself, for the grass in the ground, and for thrashing. The court held, that the special stipulations for particular allowances and payments by the outgoing tenant had excluded that for foldage by the custom of the country, which was not introduced into the lease. *Bayley J.* there said, that in *Senior v. Armytage*, which he tried on the first occasion, the lease was wholly silent as to the terms of quitting; and that the claim there was for labour (tillage, sowing, &c.) done by the outgoing tenant, from which he could not

(a) *Hall v. E. N. P.* 197, (cited 7 Bing. 470, 2 B. & Ald. 461;) first tried before *Bayley J.*; afterwards before *Thomson C. B.*

(b) 2 H. & A. 746.

the terms of quitting. To make this, *Webb v. Plummer*, there should have been by the tenant to sow the land in the then a covenant by the landlord to pay only. Again, *Robert v. Barker* (a) is a valuable case. The outgoing tenant claimed from his landlord for work and tillage of the farm according to the custom of the lease contained a special covenant not to away the manure on quitting the farm, to be expended on the land. The custom, that an outgoing tenant was entitled for the manure left. It was held, that an express stipulation excluded the outgoing tenant from recovering the value of the manure, or recovering for the tillages (b) under the *Senior v. Armstrong*, the converse of this is there the value of tillages, sowing, and was allowed to the outgoing tenant under the ground that a stipulation by him in a deed to leave the manure on the premises on the holding, without allowance, excluded the custom as to the matters specified. It is not necessary to say, the law to the extent of showing that the custom excluded by express terms. In

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use as to the terms of quitting, and the court held, notwithstanding, that the tenant having sowed in the last year of his term, was entitled by the custom to the crop which became ripe the next year; though the decision of *Jules J.*, in *Frimper v. Carbardine* was not to show, that the custom could not be taken to result by implication since the execution of the lease. *Golding v. Pigott* (a) was also mentioned.

*Balguy* and *Miller* for the plaintiff supported the rule. The plaintiff's right to recover depends on this, whether he continued to hold subject to the terms of the expired lease of 1811? and if he did, whether the custom of the country can be imported to explain them. The defendant contends that as no new agreement appears to have been made at the expiration either of the lease, or of the incumbency of the defendant's predecessor, it must be taken that the plaintiff held on the same terms, no new relation being contracted between them; at least till that presumption is rebutted by proof of a new agreement to the contrary. [*Parker B.* Unless you say the landlord imports the custom of the country into the lease, there was no obligation at common law on the plaintiff to cultivate the land, if he did not choose to do so. Here is no special covenant to sow in the last year. Permissive waste or ploughing sward are quite different from desisting to cultivate, which does not amount to waste at common law.] The stipulation, as to paying the plaintiff for manure left on the farm at quitting, is one of the terms arranged between the parties in that event. Then *Webb v. Plummer* recognizes the principle, that where parties to a lease prescribe, by the terms of it, a particular stipulation as to the conditions on which they shall separate, the maxim *expressio unius est exclusio alterius* applies. And the fact that no other condition is introduced into the lease is a

(a) 7 Bing. 465. See *Whittaker v. Mason*, 2 Bing. N. C. 359.

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strong inference that they never were intended to exist between them. The stipulation in the lease is not contrary to the custom. [*Parke B.* It only accords with it as to three-fourths of the manure.] *Roberts v. Barker* much resembles this case in circumstances. Lord Lyndhurst there says (a), "if the parties meant to be governed by the custom in this respect (viz. that the landlord should pay for the manure left), there was no necessity for any stipulation; as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it."

*Cur. adv. vult.* in order to procure a further report of the manner in which *Senior v. Armitage* was disposed of in the King's Bench on setting aside the nonsuit.

The judgment of the court was delivered in this term by

*PARKE B.*, who, after stating the pleadings, continued thus;—It appeared on the trial, that the plaintiff took the farm of the late incumbent, the father of the defendant, on 2d January 1811, by a lease under seal, comprising the tithes of the parish also, at the rent of 150*l.* for the farm, and 200*l.* for the tithes, payable at *Michaelmas* and *Lady-day*, for the term of six years from *Lady-day* 1811, if the lessor should so long continue incumbent. The plaintiff occupied till October 1832, when the incumbent resigned, and the defendant, his son, succeeded him in the living. The plaintiff continued to occupy the farm and tithes, paying the same rent at the same times, until *Lady-day* 1834, when he quitted, in pursuance of a notice given to him by the defendant.

The plaintiff claimed in this action the allowances for seed and labour due to the off-going tenant by the custom of the country; and the defendant resisted the

(a) 3 Tyr. 940.

claim, on the ground that he held under the terms of the written lease, and that by those he was not entitled to any such allowances.

It was proved, that by the custom of the country a tenant was bound to farm according to a certain course of husbandry, for the whole of his tenancy ; and, at quitting, was entitled to a fair allowance for seed and labour on the arable land, and was obliged to leave the manure, if the landlord would purchase it.


In *October* 1833, after the notice to quit, the defendant, his agent, and the plaintiff, had an interview, and the agent insisted that the plaintiff should sow the arable land, and that he was bound to keep the farm in regular course. The plaintiff accordingly did afterwards sow the arable, for which he claimed the compensation in question.

Two points were made on the argument before us; first, whether the plaintiff was bound by the terms of the lease at all, after the resignation of the lessor; secondly, whether, if he was, those terms excluded him from this claim.

Upon the first point, we think that the plaintiff must be taken, in the absence of evidence to the contrary, to have held under the defendant, on the same terms as he held under his father, so far as those terms were applicable to a tenancy from year to year. No evidence was given to the contrary on the trial; and indeed this objection does not appear to have been raised on the part of the plaintiff.

The second question requires some consideration. The custom of the country as to cultivation, and the terms of quitting with respect to allowances for seed and labour, is clearly applicable to a tenancy from year to year; and therefore if this custom was, by implication, imported into the lease, the plaintiff and defendant were bound by it after the lease expired.

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We are of opinion that this custom was, by implication, imported into the lease.

It has long been settled, that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent (a). The same rule has been also applied to contracts in other transactions of life, in which known usages have been established and prevailed: and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course, and it would be productive of much inconvenience if that practice were now to be disturbed. The common law indeed does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management that he pleases, provided he is not guilty of waste, that it is by no means surprising that the courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district, to be most beneficial to all parties.

Accordingly in *Wigglesworth v. Dallison* (b), after-

(a) See per Tindal C. J. in *Whittaker v. Mason*, 2 Bing. N. C. 870.

(b) Doug. 201.

wards affirmed on a writ of error, the tenant was allowed a way-growing crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord *Mansfield* held, that the custom did not alter or contradict the lease, but only superadded something to it.


This question subsequently came under the consideration of the court of King's Bench in the case of *Wainwright v. Armytage*, reported in *Holt's N. P. C.* 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour under the denomination of tenant right, Mr. Justice *Bayley*, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside the nonsuit, and held, as appears by a MS. note of that learned judge, that although there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common law obligations, but those imposed by custom, were in full force, where the contract did not vary them. Mr. *Holt* appears to have stated the case too strongly, when he said the court held the custom to be operative, unless the agreement in express terms excluded it; and probably he has not been quite accurate as attributing a similar opinion to the Lord Chief Baron *Thompson*, who presided on the second trial. It would appear that the court held that the custom prevailed, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

On the second trial the Lord Chief Baron *Thompson* held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or

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left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude, by implication, the tenant's right to receive a compensation for seed and labour.

The next reported case on this subject is that of *Webb v. Plummer* (a), in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also in the last year of the term to carry out the manure on parts of the fallowed farm, pointed out by the lessor, the lessor paying for fallowing the land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground, and thrashing the corn. The claim was for a customary allowance of foldage (a mode of manuring the ground); but the court held that as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, *and no more*.

The question then is, whether from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowance for seed and labour.

The only clause relating to the management of the farm (except the covenant to repair), is one which stipulates that the defendant shall spend and consume on the farm three quarters of the hay and straw arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the

(a) 2 B. & Ald. 746.



term, for the use of the landlord, he paying a reasonable price for the same. This provision introduces a subject, and has a principal reference to a subject, to which the custom of the country does not apply at all, namely, the tithes; and imposes a new obligation on the tenant *dehors* that custom; and then qualifies that obligation by an engagement on the landlord's part to give a remuneration, by repurchasing a part of the produce in a particular event. It is by no means to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting. If indeed there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing, or to plough, sow and manure, he being paid for the manuring, the principle "*expressum facit cessare tacitum*," which governed the decision in *Webb v. Plummer*, would have applied. But that is not the case here; the custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied: the only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend.

We are therefore of opinion that the plaintiff is entitled to recover. And the rule must be

Discharged.

See *Yeats v. Pim*, 6 Taunt. 446; S. C. 2 Marsh, 141; Holt's C. N. P. 95; and *Boraston v. Green*, 16 East, 71.

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CASES IN ELLIOT'S CASES

In this case the plaintiff is the holder of a bill of exchange drawn by the defendant on the 21st October 1872, and accepted by one H. C. for the payment of £100 to the order of him the said defendant 1 year after the date thereof, and that the said bill is indorsed by defendant to J. G., and by J. G. to J. H. K., and by J. H. K. to the plaintiff, and that the bill was due and unpaid at a day now past (a), and that no part of the said sum of £100, thereby payable has been paid, but that the whole is still unpaid by the defendant to the plaintiff.

THE plaintiff of this case is the holder of a bill of exchange drawn by the defendant on the 21st October 1872, and accepted by one H. C. for the payment of £100 to the order of him the said defendant 1 year after the date thereof, and that the said bill is indorsed by defendant to J. G., and by J. G. to J. H. K., and by J. H. K. to the plaintiff, and that the bill was due and unpaid at a day now past (a), and that no part of the said sum of £100, thereby payable has been paid, but that the whole is still unpaid by the defendant to the plaintiff.

J. J. Williams moved for a rule to show cause why the defendant should not be discharged out of court on entering a common appearance, on the ground that the affidavit did not sufficiently aver default payment by the acceptor. He pointed out to the court that in *Witham v. Gompertz* (b), the affidavit stated, that the day of payment of the bill was due and that such payment had been refused by the acceptor. In that case, as in *Weston v. Medley*, the points decided were, that presentment to the acceptor and notice to the drawer of dishonour, need not be sworn to. *Buckworth v. Levy* (c) is directly in point and has been acted on in several cases, particularly *Patteson J.* in *Banting v. Jadis* (d), after conferring

(a) This allegation was omitted in *Simpson v. Dick*, 3 Dowl. P.C. 1 cited ante, p. 7.

(b) Ante, p. 6.

(c) 7 Bing. 251.

(d) 1 Dowl. P.C. 448.

with the other judges of the King's Bench, and in this court in *Smith v. Escudier* (a).

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*Dowling* showed cause in the first instance. This was an action by an indorsee against the drawer of a bill. *New Witham v. Gumpertz* (b) shows, that presentment to the acceptor need not have been stated. Then why should any other circumstance be stated which constitutes a default in the acceptor. *Buchworth v. Lang* (c) will be relied on to prove the necessity to allege a default to pay by the acceptor. That case was acted on in *Gross v. Morgan* (d), *Banting v. Todd* (e), and *Smith v. Escudier*, but without further examination of its principle. In *Weedon v. Medley* (f) it was argued, that the affidavit to hold to bail ought to have alleged a presentment to the acceptor in order to establish an actual default. *Alderson B.* said, 'So the drawer is not liable without notice, but none of the forms state that.' And *Bedford B.* thought it sufficient if the affidavit stated the bill to have become due, and not to have been paid. [*Alderson B.* I was here called on to consider whether it was necessary that such an affidavit should aver presentment for payment without adverting to the point whether default of payment by the acceptor should be shown. In *Witham v. Gumpertz* this point was not taken. Lord Abinger said, 'There is a substantial difference between an averment of notice to the actual drawer of non-payment by the acceptor, and of the default to pay by him.' A drawer is entitled to notice, though due notice is often a mixed question of law and fact. But a presentment

(a) 3 Tyr. R. 219.

(b) *Ante*, p. 6.


(c) 7 Bing. 251; 5 M. & P. 23; S. C. 9 and see *Tucker v. Colegate*, 2 N. 496.

(d) 1 Dowl. P. C. 122.

(e) *Id.* K. B. 445.

(f) 2 Dowl. P. C. 689.

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to the acceptor for payment is not always essential to the plaintiff's recovering against him; for example, if the acceptor is out of the way at the time of presentment, the necessity for it is dispensed with. *Parke B.* In *Buckworth v. Levy* (a), the affidavit by an indorsee to hold the drawer to bail stated the bill to have been drawn for payment of the sum there named to the plaintiff, or his order, *at a day now past* (b). In this case there is nothing equivalent to an averment that the acceptor refused to pay. Mr. Tidd in his Forms gives the precedent in ordinary use, which might have been adhered to without any necessity to follow it exactly, or to state all the details of dishonour. It is consistent with this affidavit that the bill was never presented to or refused payment by the acceptor. In *Irving v. Heaton* (c), the Common Pleas decided, that it is not necessary to show the default of the acceptor in an affidavit by an indorsee against the drawer. Among this conflict of authorities, the question must be considered as open. The acceptor being primarily liable, the drawer, who is merely a collateral surety (d), cannot be *indebted* (e) to the indorsee in respect of the bill, unless after default by the acceptor; and an affidavit to hold to bail does not require the particularity of a declaration. If the defendant is not indebted to the plaintiff, as has been sworn, the defendant might indict him for perjury, *Eltone v. Mortlake* (f). [Lord Abinger C. B. I cannot assent to that proposition. Whether a party is indebted, is a mixed

(a) 7 Bing. 251.

(b) See as to these words, *Jackson v. Yate*, 2 M. & S. 148; *Mack v. Fraser*, 7 Taunt. 171; and 2 Tyr. 497.

(c) 4 Dowl. P. C. 689.

(d) See per Bayley J. in *Jackson v. Yate*, 2 M. & S. 148.

(e) As to these words in an affidavit to hold to bail, see 7 Taunt. 171; 7 Bing. 252; 2 M. & S. 149.

(f) 1 Chitt. R. 648, per Best J.

sion of law and fact, so that every person who  
 poses to that effect, is not indictable for perjury; for  
 may be right on the point of fact, and only mis-  
 in point of law (n). Again, the bare statement  
 a drawer of a bill is indebted, may perhaps suffi-  
 include the allegation, that he has had notice  
 dishonour; because, whether he had due notice is a  
 question of law and fact, which could not be  
 positively sworn to. The above considerations  
 it more necessary that the affidavit should go on  
 allege a default of payment by the acceptor, thus  
 showing how the drawer became indebted. *Parke B.*  
 is if possible to adhere to the form provided by  
*Tidd*, as being that best known to the profession.  
 I would argue that the allegations of presentment  
 to the acceptor and dishonour by him, are included in  
 the allegation that the defendant is indebted. In  
*Ham v. Gomperts (b)*, I inclined to the opinion that  
 where, from a knowledge of want of presentment to  
 the acceptor, or of any other circumstances discharg-  
 ing a party's liability on a bill as drawer, a deponent  
 swears that no debt was actually due from him,  
 yet swears that he was indebted, and that the  
 acceptor had refused payment, he would be liable to  
 be indicted for perjury. But how could this deponent  
 be indicted, if the bill stated to be unpaid had  
 not been presented to or refused payment by the  
 acceptor, neither of those facts being alleged in this  
 affidavit? ]. Because the defendant could not other-  
 wise be indebted at all. Presentment and notice are  
 essential parts of the defendant's title, as necessary  
 to be shown in his affidavit of debt, in order to arrest  
 the drawer of a bill, as in the declaration, to recover

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CLARKE.) See an instance, *Jackson v. Yates*, 2 M. & S. 148.) *Ibid.*, p. 8.

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against him. "To swear to a debt, must be taken to mean to swear to a legal debt."

LORD ABINGER C. B.—*Buckworth v. Levy* has been acted on by my brothers *Littleton* and *Paterson*; after conference with the other judges of the court of King's Bench, as also in this court in *South v. Escudier*. On this account, as well as for the reasons I have mentioned, we ought to adhere to that decision.

PARKE B.—The case of *Banting v. Jadis* was in fact a decision of the whole court of King's Bench, who, after consideration, confirmed the decision in *Buckworth v. Levy*. The late case of *Witham v. Gompertz* in this court is no authority in favour of this affidavit, for all there decided was, that in an affidavit of debt against the drawer of a bill, it was sufficient to allege refusal by the acceptor to pay it in order to give an indorsee a right to arrest the drawer. The only cases, therefore, in favour of this affidavit are *Weedon v. Medley* and *Irving v. Heaton*. It is clear that the first case turned on the mere ground that the want of an averment of a presentment for payment was not a sufficient objection, and the court did not look into the affidavit to see whether it averred a refusal to pay by the acceptor. *Irving v. Heaton* appears to have been decided on the authority of *Weedon v. Medley*. The weight of authority is allowed to be against the validity of this affidavit; and it would be very difficult to indict the deponent for perjury, if the bill had never been presented at all; for it would be quite consistent with this affidavit, that the bill had never been presented either for acceptance or payment, and that neither the drawer had ever refused to accept, or, as in *Witham v. Gompertz*, the acceptor to pay it.

BOLAND, B. — *Irving v. Heaton* proceeded on *Veeton v. Medley*, which, however, was not an authority in support of the point held in the former case.

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ALDERSON, B. — *Cross v. Morgan* appears to me to be the first case actually decided on this point. In *Heaton v. Madley*, my attention was not called to the defect now insisted on, and I certainly never intended to lay down any rule contrary to that expressed in *Cross v. Morgan* and *Banting v. Jadis*.

Rule absolute to discharge the prisoner.

*ROUSE and Another against SWAN.*

THE copy of a writ of *capias* delivered to the defendant at his arrest, directed the sheriff to "take Thomas Swan, a clerk in the Army Pay Office, Somerset House, in the city of Westminster in the county of Middlesex." Busby moved to set aside the copy so delivered, and the service thereof, for irregularity with costs, and to deliver up the bail-bond to be cancelled, on an affidavit by the defendant that his place of residence was 25, Oxford Terrace, Edgware Road, in the county of Middlesex, and that the place of business of this deponent, for 37 years last past, had been and still was the Army Pay Office, Whitehall, in the said county of Middlesex, and not elsewhere, and that he

A *capias* which described the defendant as "T. S." a clerk in the Army Pay Office, Somerset House, in the city of Westminster and county of Middlesex," was held insufficient, for the blank — following the words "C. D. of," in the form No. 4, provided by R. 4, c. 29. should have been filled up with the place of the defendant's actual or supposed residence, or if the plaintiff is ignorant of these, then with the place where the defendant then is, or is supposed to be, by analogy to the directory part of s. 1. respecting writs of summons.

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never resided at or had any place of business at the Army Pay Office, Somerset House, in the city of Westminster, as described in the copy of the writ, and that deponent had inquired, and had been informed that no such place exists, and that he had procured a bail-bond to be executed. A rule was granted, on the ground that the defendant's residence was not sufficiently stated in the writ, pursuant to 2 Will. 4. c. 39.

Mr. H. Watson showed cause. The description is sufficient. In *Hill v. Hursey* (a), Lord Abinger was of opinion, that in a writ of *capias* the blank in the form (No. 4) provided by 2 Will. 4. c. 39. was sufficiently filled up by any thing which gives such a clear and definite *descriptio personæ*, as may reasonably enable the sheriff to find and take the party. *Buffle v. Jackson* (b), decided by Tenterden J. is in point. In *Welsh v. Langford* (c) that learned judge held a *capias* good which described the defendant thus: "Capt. J. of the Hon. East India Compy's ship K., and now most likely to be found at the East India House, London." In *Clarke v. Palmer* (d), Lord Tenterden seems to have thought that the indorsement on the *capias* of the name and place of abode of the defendant, was only for the information of the sheriff, and might be filled up by such a description as the plaintiff's attorney is able to give. [Parke B. The short question is, what is the meaning of that blank in the *capias*, and whether it is to be filled up as described by sect. 1, or by any description of a defendant which amounts to a *descriptio personæ*. Now *Roberts v. Wedderburne* (e)

(a) Trin. 1835, 5 Tyr. in the press.

(b) 2 Dowl. P. C. 505.

(c) *Id.* 498.

(d) 9 B. & Cr. 153. See as to this case, *Strong v. Dickenson*, post, p. 683.

(e) 1 Bing. N. C. 4.



is an authority against the latter position. The court of Common Pleas there decided, that the writ of *capias* must state the place where the defendant resides, or, if it is unknown, that where he is supposed to reside. The addition of a man's residence in a writ of summons, under sect. 1, may be said to be needless, when he must be served with it. *Alderson B.* The writ of summons is directed "To *C. D.* of &c. in the county of —," which shows the description of the defendant to be there necessary. In the writ of detainer, where no doubt at all exists as to the person to be affected by process, he being in custody, no "of &c." occurs.] The sheriff, and no one else, is prejudiced by the imperfect description of the party whom he is to arrest. If "of —" means a place of residence, *Hill v. Harsey* cannot be supported, for "late of," denies "of —" and excludes the present residence, actual or supposed. The defendant is to be found at his place of employment, the Army Pay Office, *Whitehall*; and as there is no other such office, *Somerset House* could not mislead.

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*Busby contra.* As this is a technical matter not referable to principle, but solely governed by positive enactment, it is better to adhere to its terms. Now they require not a mere *descriptio personæ*, but a filling up the blank with a place of the defendant's residence, either present or late. "*E. F.* of —" occurs in the schedule of 53 G. 3. c. 141, the annuity act, and it has been held, that the — should be filled up with *E. F.*'s place of abode, *Darwin v. Lincoln* (a), *Smith v. Pritchard* (b). Sect. 2. of the annuity act provides for making such alterations in the schedule as the nature and circumstances of a particular case, *e. g.* (a

(a) 5 B. &amp; Ald. 444.

(b) *Id.* 717.

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soldier, sailor, &c. having no residence at the time might reasonably require; but there is no such provision here. *Lingredge v. Roe* (a) supports *Robert v. Wedderburne*; and *Hill v. Harvey* is not necessarily a variance with those cases, for the late residence of the defendant was there stated in part compliance with the act. Nor is the defendant stated to be a clerk of a sheriff belonging to the office. Thus an attachment against the sheriff is not well grounded on a service on a clerk in the office, who might be placed there for the occasion, unless he is sworn to be a clerk of the sheriff. The misdescription of *Somerset House* is clear, nor does the plaintiff's attorney swear that he did not know the defendant's actual residence.

PARKER B. (b).—It appears to me that this writ should be made absolute, on the defendant's entering a common appearance and undertaking to bring no action. The act for the uniformity of process, 2 Will. 4, c. 37, requires the capias to be in a particular form, which describes the defendant as "C. D. of —." Now, it appears to me that the word "of" is *prima facie* meant to connect itself with the actual place of residence of the defendant, who is the party to be described. We may call in aid the first section to discover the intention of the legislature in using that word in this form of capias in No. 4. That intention will be sufficiently satisfied, if the blank which follows "of" is filled up by any one of the four descriptions of the defendant's residence, which are directed by sect. 1. to be stated in a writ of summons; viz, "the place and county of the residence or supposed residence of the defendant, or wherein he shall be or shall be supposed to be." Besides, the court of Common Pleas,

(a) 1 Bing. N. C. 6.

(b) Lord Abinger C. B. was sitting in equity.

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*Roberts v. Wedderburne* (a), and *Lindredge v. Roe* (b), as put the same construction on the writ of capias to. 4. provided by the act. Nor are *Welsh v. Langford* and *Hill v. Harpey* necessarily the other way, as both may be supported on the principle of construing the description as of the place where the party might be "supposed to be," viz. referring to the first section. Though in *Hill v. Harpey* Lord Abinger seems to have assented to the doctrine of *Taunton J.*, that a *descriptio personæ* which would identify the party, would be sufficient, neither of the cases in the Common Pleas was there cited. My own opinion accords with the decision of that court, which seems to me to be a more natural and reasonable construction. I think it not enough to describe the defendant by his property, calling, or other circumstance sufficient to identify him personally; but that the *prima facie* object of the statute is, that the blank should be filled up with his place of residence, actual or supposed, or wherein he shall be or be supposed to be, as in sect. 1. *Buffle v. Jackson* only decided that the place of residence actually given need not be precisely correct, and the weight due to the cases in the Common Pleas, was not adverted to in *Hill v. Harpey* and *Welsh v. Langford*. Here, there is no description of the actual or supposed mode of residence of the defendant, or of the place where he is or might be supposed to be; he is not said to be of the Army Pay Office, but a clerk in it; which is not equivalent to the word *of*, here omitted. The description here given is of his person only, and not of the place where he may be supposed to be. I, for one, regret that the majority of the judges resolved not to amend matters of form in writs of summons and subpoenas, for doing which the costs of amendment would

(a) 1 Bing. N.C. 4.

(b) *Id.* 6.

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in general be sufficient penalty ; but since they have so held the point, the decision is binding, and must be adhered to. If we were inclined to adopt a system of equivalents, which I am not, it appears doubtful whether this in fact amounts to one. The residence need not be stated to be within the county of the particular sheriff.

**BOLLAND B.** concurred.

**ALDERSON B.**—I am of the same opinion. The safest way to fill up the blank in a writ of capias after "of —," is to refer to the first section, *i. e.* to fill it up with the place of actual residence, if known ; if not known, with that of the supposed residence ; if neither are known, then with the place where the defendant is, or is supposed to be at the time. He might be stated to be of a named county, generally, if the plaintiff's attorney could give no better description, but this he would do at his peril, being bound to give a better description if able to do so.

**GURNEY B.** was at chambers.

Rule absolute (a).

(a) See *Price v. Husley*, 4 Tyr., 60.

**FORBES against CROW.**

Where notice of trial of a cause is given for a sitting in term, and the defendant resides above

forty miles from London, a two days' notice of continuance of trial to the next sitting, is not sufficient to save the plaintiff from paying the defendant's costs of the day for not proceeding to trial at the first sitting.

**RULE** for costs of the day for not proceeding to trial pursuant to notice.

Cause was shown by *Humfrey* in the first instance, that regular notice of continuance of trial had been

given. The defendant had been served with notice of trial at the first *Middlesex* sittings in this term at his residence at *Ramsgate*, and with his witnesses, who also resided there, arrived in town on Friday the 22d, the night before the first sitting day in *Middlesex*. In the meantime, and after post time on the 21st, the plaintiff's agent had served on the defendant's agent notice of continuance of the trial to the second sittings in this term. This was a sufficient two-day notice of continuance, reckoning one day inclusive, and the other exclusive (a), without an intervening Sunday; *Grojean v. Manning* (b).

*Petersdorff* in support of the rule contended, that as the defendant lived more than forty miles from London, the case was distinguished from that where the parties are resident in London or *Middlesex*, particularly as six days' notice of countermand would under such circumstances be requisite.

LORD ABINGER C. B.—The master certifies to us that the distinction contended for by the defendant exists. The two-day notice prescribed can only apply to a cause arising in town, or within forty miles, and the books of practice carry it no further. This point has been said not to have been decided, but there is no reason why in future there should be any difference in the time allowed for giving the notice of continuance and the notice of countermand. In a cause where the parties are resident in London or *Middlesex*, it would in general be sufficient to serve a two-day notice of continuance by nine o'clock at night. Six days' notice of continuance are necessary where the defendant lives more than forty miles off, as a party might

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OF  
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(a) Tidd, 758, 9th ed.

(b) 3 Tyr. 725, and see *Wardle v. Acland*, 3 Tyr. 819.

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otherwise be on his road to town with his witnesses, from his or their places of residence, before the notice so served could come to his hands. In this case, however, the costs of the day must be costs in the cause.

The other barons concurred.

Rule discharged.

WIPPELL *against* ROBERT MANLEY.

The recital in a writ of trial of a particular day as that on which the writ of summons issued, (pursuant to form 5. in *Reg. Gen. Hil. 4 Will. 4.*) is conclusive, and cannot be contradicted by parol evidence at the trial; but if a writ, in the first instance erroneous, is acted on by being served, and is afterwards altered and resealed behind the defendant's back, so as to defeat a tender made by him after it was first served, and before it was amended, the trial will be set aside, and the writ of trial

**D**EBT for goods sold and delivered. Plea: *namquam indebitatus*, except as to part, 2l. 10s. 6d., and tender of that sum before the commencement of the suit. Replication, that a writ was sued out before the tender. The writ of trial was in form No. 5. provided by *Reg. Gen. Hil. 4 W. 4.*, [*ante*, Vol. IV. p. xix.] and recited 24th November 1835, as the date of the writ whereon the action was commenced, and the 11th December 1835 as that on which the tender was made. At the trial in *Devonshire*, the plaintiff's attorney being examined as a witness by the defendant, was called on to produce the original writ of summons under a *subpœna duces tecum*, but he refused to do so, and the under-sheriff held the evidence inadmissible, on the ground that no evidence of the real time of commencing the action could be admitted to contradict the record of the writ of trial. He also, for the same reason, rejected evidence tendered by the defendant to show that the writ sued out on the 24th November had been abandoned, and a fresh writ served on the 26th December, viz. after the tender, which was proved to have been made as laid, on the 11th December. The plaintiff had a verdict.

amended on motion, by inserting the day on which the writ of summons was resealed

*J. Greenwood* for the defendant moved to amend the writ of trial at the expense of the plaintiff's attorney, inserting the real date of the issuing that writ of summons on which the action proceeded, and for a new trial, with costs of the first trial to be paid by the plaintiff's attorney, or to set aside all the proceedings on account of irregularity. He relied on the defendant's affidavit, that about the end of *November* 1835 he had been served with a copy of a writ of summons addressed to *Richard Manley*, which appeared to have been issued on the 24th *November*, that he tendered the money on the 24th *Dec.*, and on the 26th *Dec.* was served with a copy of writ of summons addressed to him by the name *Robert Manley*, which last writ also appeared to have been issued on the 24th *November* 1835. The defendant swore to his belief that that writ was not so issued, but that the first writ was altered by erasing *Richard* and inserting *Robert*, long after the 24th *November*, which appeared from the record. [*Parke* B. Under the now prevailing system a record of this description is framed upon a rule which has the force of a statute, and requires the precise day on which the writ of summons issued to be inserted in the writ of trial. That is therefore conclusive.] He cited *Lester Jenkins* (a) to prove that in the old proceeding by *parol*, a party was always at liberty to show by *parol* evidence, that the suit was actually commenced at a later and later period than that which would otherwise be presumed. A rule was granted, calling on the plaintiff to show cause why the writ of trial should not be set aside and the record amended at the costs of plaintiff's attorney.

*Tightman* showed cause for the plaintiff on affi-

(a) 8 B. & Cr. 339; see judgment of *Bayley* J.

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deavits that the writ of summons issued on 24th November 1835. That the defendant being misnamed therein *Robert* instead of *Richard*, it was altered and resealed on the 19th December, and the *præcipe* for was amended accordingly. On 20th January 1836 the plaintiff entered an appearance for the defendant and filed a declaration on the 21st. On the 29th the defendant obtained a baron's order to set aside the writ of summons and all subsequent proceedings for irregularity with costs, which order was discharged with costs. The defendant pleaded; the issue recited that defendant had been summoned to answer the plaintiff by virtue of a writ issued on the 24th November, and the writ of trial stated that the plaintiff impleaded the defendant on that day. *Braithwaite v. Lord Montford* (a) shows, that a resealing gives effect to a writ from the time it originally issued even for the purpose of avoiding the statute limitations. [*Parke B.* Here a trial has taken place. What injustice would be done to the defendant by ousting his tender made before the resealing? Suppose that, before the writ was amended in fact the defendant had moved to set it aside for irregularity, his application would have been in time. The amendment by resealing did not make the writ run back to the time of its first issue. *Alderson J.* The plaintiff artfully altered and amended the writ behind the defendant's back, in order to defeat him in his tender.] Secondly, this application is too late. The defendant should have moved to set aside the writ of summons, or to place the true date of the writ of summons on the record, before the expense of a trial was incurred.

*J. Greenwood* in support of the rule. In *Braithwaite*

(a) 4 Tyr. R. 276.



Lord Montford the writ was not acted on by vice till after it had been resealed, which distinguishes that case from the present, and shows the writ to have been irregular; *Adams v. Railway* (a). As this writ was served before the alteration was made in it, *Miller v. Miller* (b) and *Glenn v. Wilks* (c) in point, and show that a writ which is altered by sealing after it has been acted on by service, is bad. At least something in the new rules shows that a defendant is to be bound by any statement on the record, which would not have been binding on him previously, is not now estopped from showing the true date at which the writ of summons issued. Now in *Wilton v. Wilton* (d), the court suffered the plaintiff to contradict the date assigned in his own special memorandum as that on which his bill was filed against an enemy. [*Alderson* B. Writs could at that time be issued in term.] *Granger v. George* (e) is also in point to show that the real time of issuing the writ might have been given in evidence. [*Parke* B. We refused the rule on this ground, for since the late rules no proof can be received to contradict the date of issuing the writ, as stated in the record. To admit the evidence would be to let in all the evil which those rules were intended to avoid; for the true date of the writ was ordered to be stated, in order to prevent any question arising on it at the trial.]

Lord ABINGER C. B.—The justice of the case will be answered by setting aside the proceedings without payment of costs on either side. I agree to the decision taken for the defendant between this case and

) 1 Marsh. 602. Remarked on, 2 Bing. N. C. 68.

) 2 Bing. N. C. 66.

) 4 Dowl. P. C. 332, *Littledale J.*

) 5 Bar. & Cr. 149.

(e) *Ibid.*

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*Brathwaite v. Lord Montford.* If the parties will not agree to a *stet processus*, the plaintiff may amend the record by substituting the 19th December for the 23rd November.

**PARKE B.**—As the plaintiff has been irregular in altering the writ behind the defendant's back, to defeat his plea of tender, we do not think the present application too late; but as the defendant has also been in error, the plaintiff may still reply a previous demand and refusal. *Brathwaite v. Lord Montford* is not necessarily in point for the plaintiff.

The other barons concurred, but the parties assented to the entry of a *stet processus* (a).

(a) See *Johnson v. Taylor*, 4 Tyr. 450; and *Nicholson v. Lemon*, id.

*JACKMAN against MORTON.*

Nothing in  
sect. 19. of  
the *Middlesex*  
county court  
act, 23 Geo. 2.  
c. 33., en-  
titles a de-  
fendant to  
double costs,  
where the  
plaintiff's  
damages are  
reduced below  
40s. by the  
proof of a set-  
off; for by  
reference to  
sect. 1. and  
sect. 4., the  
plaintiff could  
not have sued  
in the inferior  
court for his original debt, and could not compel the defendant to  
plead a set-off.

**DEBT** for 17*l.* alleged to be due for work and labour. Plea of set-off. The defendant lived within the jurisdiction of the county court of *Middlesex*, and was liable to be summoned to it. At the trial before the under-sheriff of *Middlesex* on 3d March, under a writ of trial, the plaintiff had a verdict for 15*l.* only, the set-off being proved as to the rest. The next day an order was made by a baron to stay proceedings till the fifth day of this term, to give the defendant an opportunity to move to enter a suggestion on the roll under 23 G. 2. c. 33. s. 19.; the county court of *Middlesex* act, on the terms of bringing into court 15*l.* and the taxed costs within a week.

The 15s. and the costs were accordingly paid in, and Jones obtained a rule nisi to enter a suggestion in order to entitle the defendant to double costs.

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Humphrey showed cause. The plaintiff's original demand was above the jurisdiction of the county court. *Id.* (9th ed. 959) says, "It is a constant and invariable rule that none of the court of conscience acts in cases where the debt being originally above the limited amount, is reduced under it by means of a set-off or tender." *Pitts v. Carpenter* (a) arose on the London court of requests' act, 3 Jac. 1. c. 15., and the court said, "Though the damages were under 40s., it is plain that the real demand was above 40s., and how could the plaintiff tell whether the defendant would set off any thing in that action, so as to be bound to choose that jurisdiction. Besides, he has in effect recovered more, because a debt which he must otherwise have paid is now satisfied. Here two causes are determined, both of them of greater value than is within the inferior jurisdiction." The allowance of costs in *Jones v. Harris* (b), by Taunton J., was entirely grounded on the ascertained fact, that the demand was not reduced by a set-off. [Lord Abinger C. B. The good sense of the distinction is clear. The only doubt is, whether this act is or is not peremptory.] Section 1. of this act confines the jurisdiction of the county court to suits where the debt or damages shall not amount to 10s. Now the subject of this suit being 17l., the plaintiff could not have summoned the defendant to the county court. [Lord Abinger C. B. But might not he have sued for the 15s., giving the defendant credit for his cross-demand on him of 16l. 5s.? Section 19.

(a) *Sun. 1191.* *London v. Dowd* 1 *P. 234* 10m1

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gives the defendant double costs where the jury find the damages for the plaintiff under 40s.] That must be when subject to the jurisdiction conferred by sect. 1. The plaintiff could not foresee that the defendant would set off under the statute, instead of asserting his right to bring a cross-action; nor could he oblige the defendant to come into the county court and strike a balance there before the jury. Had he sued for the balance only, he could not have compelled the defendant to give a notice of set-off, or have prevented him from reserving his right to sue for his whole demand in a future action in a superior court. [*Parke B.* Neither party could legally split his entire demand against the other by suing for 40s. only in the county court, though it is however frequently done. Had the plaintiff sued for 40s. only, he would have abandoned the rest of his claim.] Besides, sect. 4. restricts the jurisdiction to the cases cognizable in the old county court. (Stopped by the court.)

*C. Jones* in support of the rule. Sect. 19. expressly provides, that if the jury shall find *damages* for the plaintiff under 40s., the defendant shall in such a case as the present have double costs. The county court is not to have jurisdiction over debts above 40s., and the debt recoverable by the plaintiff was here only 15s., that being the real balance due to him. [*Parke B.* To adopt your argument would be to compel the plaintiff to abandon the rest of his debt by suing in the county court, and to disable himself from setting it off when sued by you in a cross-action, so as to leave it in your option to deprive him of his debt altogether; nor could he defend the cross-action by showing that he had given credit for the debt due to the defendant in the former suit, unless he admitted it; for there must be two parties to an account stated. *Alderson B.*

ry important questions may arise on a dispute for  
 [In *M'Collam v. Carr* (a), *Eyre* C. J. made a  
 similar remark, and held, that this act only applied  
 where the original demand was under 40s., and not  
 where it had been reduced by payment of money on  
 account; but this point being alluded to in *Bateman v.*  
*Smith* (b), Lord *Ellenborough* said it was assuming  
 the whole question to say that the original debt was  
 over 40s., for the jury had found the damages to be  
 under 40s., which entitled the defendant to recover  
 reasonable costs by the very words of the act under  
 consideration. Again, in *Chadwick v. Bunning* (c),  
*Watt* C. J. assented to the last case, saying, the  
 words of this act are very peculiar. See also *Clark v.*  
*Allen* (d) and *Horn v. Hughes* (e). [Lord *Abinger* C. B.  
 because the cases you cite were cases of reduction of the debt  
 by part-payments by the defendant, so that when the  
 plaintiff brought his action in the superior court he  
 did not have a debt above 40s. *Parke* B. In the case of a  
 debt reduced by part-payment, the act of payment has  
 been done by the defendant, and the appropriation of  
 the money has been made by the plaintiff before com-  
 mencing any action. The plaintiff ought not, there-  
 fore, to sue in such a case; whereas in the case of a  
 simple right of set-off, it depends on the will and  
 the act of the defendant whether or not he will  
 avail himself of the statute enabling him to set off the  
 debt due from the plaintiff to him.] The verdict of  
 a jury is treated by Lords *Ellenborough* and *Ten-*  
*den* as the test whether the statute applies or not.  
 The only debt due is the balance. [Lord *Abinger* C. B.  
 that is a mistake; the debt due is the original debt.  
*Parke* B. The balance can only be said to be the debt

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(a) 1 B. &amp; P. 223.

(b) 14 East, 301.

(c) 5 B. &amp; Cr. 532.

(d) 8 East, 28.

(e) *Id.* 347.

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due, where the defendant chooses to set off his debt.] Where a defendant is arrested for the whole debt on one side of his account, without being credited for a cross-demand by him, which is afterwards set off, and the plaintiff's damages are reduced accordingly, the defendant would be entitled to costs, on 13 Geo. 3. c. 46: for the balance only, as found by the jury, was the debt subsisting at the time of the arrest. [*Parke B.* There the plaintiff has already a security for all but the balance.]

*Lord ABINGER C. B.*—This appears to me to be a clear case. No authority has been cited to show that the act in question has ever been held to extend to the case of a plaintiff's claim reduced below 40s. by a set-off. The decisions relied on were either cases where the original debt did not exceed 40s. as in *Bateman v. Smith*, where on a plea of infancy no debt for necessities beyond 1/ 15s. was made out, so that the plaintiff could accordingly have sued in the county court; or instances in which the original debt had been reduced by payments. Now payment reduces a plaintiff's claim *ex necessitate*, but a right in his debtor to set off a debt due from the plaintiff does not, unless the defendant chooses to plead a set-off. But the plaintiff cannot tell whether he will or not do so. In all these cases, the defendant, before the new rules, might have reduced the debt on the general issue; but where he has a set-off, it depends on him whether he will take advantage of the statute enabling him to do so, or whether he will compel the plaintiff to make out his whole case without giving him any credit, and afterwards resort to a cross-action. Then the plaintiff cannot know before commencing his action which course the defendant will adopt. Again, if this act may be thus made to apply to claims of much larger amount than

40s., it will occasion the inconvenience mentioned by *Byre C. J.* (a), that the most important and intricate accounts between merchants may be made the subject of discussion in an inferior tribunal, for the jurisdiction of which they were never intended. By referring sect. 19. to sect. 1., it is clear that the debt not being under 40s., the defendant was not liable to be sued at all in the county court, and also that the defendant's right to double costs is confined to cases in which he could have been sued there.

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*PARKER B.* I am of the same opinion. Section 4. places the modern county court of *Middlesex* on the same footing as the original county court. The question then is, whether sect. 19. is not to govern sect. 1., in order to avoid the inconveniences which have been pointed out. The general rule of construing these acts is, that they extend to those cases of part-payment, or other matter amounting to satisfaction, where by a present assent of one of the parties to pay, and of the other to accept, the debt is reduced to the sum over which the inferior court has jurisdiction, and the balance only should be sued for. But the rule is equally clear, that these acts do not extend to cases where the debt is open to be reduced by a right to plead a set-off under the statute, which the defendant cannot be compelled to exercise. However, it is now suggested, that the peculiar wording used in sect. 19. of this act has imposed on us the necessity for a different rule of construction, and that the defendant is to have his double costs, as well as to be exempted from paying costs. But when sect. 1. shows that neither the plaintiff nor the defendant could ever have sued in the county court for their respective debts, we must

(a) *A. B. & P.* 224. c. 24. q. 1. of 1836.

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read the two sections in conjunction. Then by confining the operation of sect. 19. to cases, where not only the defendant is liable to be summoned in that court, but the debt is also of an amount which could be sued for there, we shall bring this act within the range of the decisions on other similar statutes. This is clear upon the statute, and the great inconvenience of a contrary holding would alone have inclined us to the same decision. Had we looked at sections 1. and 4. at the time this motion was made, or been referred to them as well as to sect. 19., we might not have granted the rule.

BOLLAND B.—*Horn v. Hughes* (a) comes nearest to this case, but the ground on which that case proceeds, as pointed out by Lord *Ellenborough*, distinguishes it from the present; for he there says, “It appears that less was due at the time of bringing the action by means of a part-payment of which the plaintiff must have been cognizant.” Here the debt is in no way reduced at the time of bringing the action, and the plaintiff could not then tell whether the defendant would give him notice of set-off, so as to reduce it at the trial.

ALDERSON B.—This plaintiff had no remedy except in a superior court, for if he could not agree with the defendant as to the balance, he could not compel him to adjust it in court, or to plead a set-off. Before we can affirm that a defendant is prejudiced by the bringing an action against him in a superior instead of an inferior court, we must see that the plaintiff could have sued in the latter. For if he could not, to inflict double costs on him for not doing what the law does

(a) 8 East, 347.



not oblige him to do, would be an absurd consequence which cannot be implied from the wording of any act of parliament.

Rule discharged with costs.

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**Strong against DICKENSON, Gent. and &c.**

**F. V. LEE** obtained a rule on 6th May to set aside the *ca. sa.* herein for irregularity, and to discharge defendant out of custody of the sheriffs of London with costs. The copy of the *ca. sa.* annexed to the affidavit was only indorsed thus:—"Take 405l. 10s. 6d. besides officers' fees. *J. Platt, 5, Church Court, Clement's Lane, 30th December 1835.*" He relied on *Clarke v. Palmer (a)*.

An attorney arrested on a *ca. sa.* swore that he was on his way through the city to *Westminster*, when he thought of going to see a client at the Auction-Mart coffee-house, where he was arrested: Held, that he was not entitled to be discharged, as he had not sworn that his sole purpose on leaving home was to attend his client's business at *Westminster Hall*.

*Platt* showed cause. The object of the rule of the court of King's Bench, (*Hilary, 2 & 3 G. 4.*) requiring the addition and place of abode of the defendant to be indorsed on a *ca. sa.* by the plaintiff's attorney, was to protect the sheriff by showing him where to find the defendant, but no rule of this court requires such an indorsement. In the case cited the controversy was between the plaintiff and the sheriff.

*Lee contra.* *Constable v. Fothergill (b)* shows that the rule in question was not made entirely for the benefit of sheriffs. [*Alderson B.* Out of two objections there taken, Mr. Justice Patteson was able to arrive at his decision on one.]

**PARKE B.**—It is sufficient for us to decide this case on the fact certified to us by the master, that there is

There is no rule of this court, or statute compelling the plaintiff to indorse the place of the defendant's abode on a writ of *capias ad satisfaciendum*. (See *Reg. Gen. Hil. 2 & 3 G. 4., in K. B.*)

(a) 9 B. & Cr. 153.

(b) 2 Dowl. P. C. 591.

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no rule in this court making this indorsement necessary, and the uniformity of process act, has nothing to do with *ex. sa.* Rule discharged with costs.

A rule was afterwards obtained by *Lex* for a *habeas corpus* to bring up the defendant, and discharge him as privileged from arrest, under the following circumstances:

A writ of *ex. sa.* had issued against the defendant on the 30th December 1835, but he was not taken on it till the 23d April last. Between two and three of the afternoon of that day he was followed out of the Excise Office in Broad Street along Tottenham Street into the coffee-room of the Auction Mart coffee-house, and was there arrested. The officer swore that defendant did not tell him that he was going to attend either of the courts at Westminster or any other professional business, but said that he had gone to the coffee-house to see a person about a loan on his property, with a view to pay the plaintiff's debt, and was therefore sorry that he had taken him in execution. It was sworn that the defendant was attorney in several causes, the names of which were stated, and were then pending in the courts at Westminster, and that he had business at the coffee-house mentioned with a client named . . . The defendant swore that he was on his way through the city, to Westminster, but that it having occurred to him that he had to see a client at the Auction Mart coffee-house, he went thither.

*Platt* showed cause. The defendant claims his discharge, not as a personal privilege, but for a contempt of the court before which he was about to attend as an attorney. He had deviated from his road to Westminster, and was not *bonâ fide* coming to Westminster on the business of his clients.

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*Little and Lee* in support of the rule. The ex-  
ception of a practising attorney from arrest is the pri-  
vilege of the client, and is not lost by any reasonable  
deviation or delay. *Parke B.* Is there any case  
before that of the party who had attended a trial as  
counsel and diverged into a picture-shop (a), where a  
deviation was permitted, except for the purpose of  
necessary refreshment, or for some object connected  
with the privileged journey from home or back again?  
The party's delay in dining with his witnesses after  
the conclusion of a trial, as in *Lightfoot v. Cameron* (b),  
is consistent with his object in returning home. It is  
not sworn that the defendant's sole object in leaving  
home was to attend the courts here. What was there then  
to hinder him from going round the whole city on busi-  
ness on his alleged way to Westminster, where he might  
never have arrived at last? In *Edwley v. Nathaniel*,  
the defendant might have a right to rest himself in a  
picture-shop. If it was not convenient to state the  
exact house the defendant came from, he might have  
stated from what quarter of the town or place in the  
neighbourhood he was coming to Westminster. But  
Parke B. This is a case of *motu proprio*, and it would suffice  
if the defendant could be shown on the road to West-  
minster, but the arrest takes place while he was in a  
coffee-house *extra viam*. It is not said that he pro-  
ceeded from his office by such and such a way to West-  
minster.] In *Pitt v. Coombes* (c), the plaintiff had re-  
turned from court, where he had made a motion, to his  
office of business, where he refreshed himself, and stayed  
between one and two hours, till he left it to go home, and  
in going turned into a tailor's shop in the same street, was  
arrested there. He was discharged; and *Little and J.*

(a) *Edwley v. Nathaniel*, 2 Dougl. B. C. 51. (b) *Lightfoot v. Cameron*, 11 B. & A. 1078. (c) *Pitt v. Coombes*, 11 B. & A. 1078.

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there cited a case from *Gilbert's cases* (a), where the court discharged a woman, who being resident at *Portsmouth*, and a witness in a cause at *Winchester*, stayed there after the trial had ended at four on *Tuesday* afternoon, and was arrested at seven on *Saturday* evening, as she was getting into the coach to go to *Portsmouth*. [*Alderson B.* That case does not decide that she might not have been arrested on the *Saturday*, or if she had been out of her road to *Portsmouth*. That arrest was *redundo*, not *morando*. This case would do if the defendant could show himself on the road to *Westminster*. The defendant's affidavit could not be answered, for it only swears to the intention of his mind.] *Stokes v. White* applies (b).

*Lord ALDERSON C. B.*—It is undoubtedly the duty of this court to protect persons going to, remaining at, or returning from the places to which the business of their clients takes them, when either predicament is clearly established to be the fact. A man need not go full speed, or the shortest way home, but may go for a few yards out of the way thither. The real question is, whether this defendant was on his way to *Westminster Hall*; and after considering the principle of the cases in which parties have been discharged, there does not seem to have been in any of them a stay on the road, or a deviation from it, unconnected with the object of returning home, so as to justify each particular arrest. Food may be necessary, and the party need not fast till he returns home. The party arrested at his dinner on returning from court, was not at a place out of his way home. So in *Holiday v. Pitt* the party was arrested in the act of returning home, and it did not appear she could have got away from *Winchester* before. But this affidavit is too loose

(a) *Holiday v. Pitt*, *Gilb. Rep.* 308; 2 *Stra.* 986. (b) 4 *Tyr.* 786.

enable us to discharge this defendant. He says, he was passing through the city to Westminster on the business of his clients. Consistently with that, he might attend his own business at different places during the whole day, and then claim privilege from arrest, if he got to Westminster to his clients' business at the last moment. Had he set out on that business and gone into the coffee-house as he passed, the case might be different, but he was there, and, as it appears, on a business wholly foreign to that of his client's. He has not stated that, living in the city, he had set out from his home there to come to Westminster on his client's business, but accidentally deviated from his way there.

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PARKE B.—I found my opinion entirely on the deficiency of the affidavit produced in support of the rule. It does not state where the defendant's house is, or that he left it solely for the purpose of attending his client's business at Westminster. Now it is only in respect of that attendance there that he is privileged from arrest, and not in right of his attending on his various clients elsewhere. Setting out for the city solely to attend to business of clients there, with a mere ultimate intention of going to Westminster on a similar errand, will not be sufficient. We should be carrying the client's privilege too far did we discharge this defendant. I give no opinion as to what deviations are allowable. Those stated in the old books may be reconciled to the purpose of the party in going and returning from the protected place. The later cases go further, and may be right.

BOLLAND B.—I am of the same opinion. In *Lightfoot v. Cameron* (a), Eyre C. J., allowed this privilege notwith-

(a) 2 W. Bla. 1190.

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standing the defendant had deviated a short way from his direct road home in order to get refreshment after a trial in which he was a plaintiff. I should not have thought that his stopping at this coffee-house for necessary food, would *per se* have made him liable to arrest.

ALDERSON B.—Consistently with the defendant's statement he might never have arrived in the city in order to go from thence to *Westminster Hall*. One of the plaintiff's affidavits discloses that his clerk had tried to dissuade him from going to the Auction Mart, and attributed his arrest to his having gone there. On the weakness of the defendant's original affidavit, this rule must be

Discharged.

KERBEY *against* EDWARD and WILLIAM DENBEY  
WARREN, and WESTERN.

Trespass  
against bailiffs  
for breaking  
and entering  
plaintiff's

TRESPASS for breaking and entering the plaintiff's dwelling-house, making a great disturbance therein, and assaulting and imprisoning the plaintiff.

dwelling-house, and assaulting and falsely imprisoning him.

Pleas: first, not guilty; secondly, as to all the trespasses alleged (except the breaking the house) a justification under a *ca. sa.* and warrant thereon, by virtue whereof the defendants entered the house, the outer door being open, and arrested the plaintiff.

Replication admitting the writ and warrant, alleged the trespasses to be committed by the defendants *de injuriâ sua propriâ absque residuo causa*.

The evidence was, that the defendants, in execution of the warrant, broke open the outer door of the plaintiff's house and arrested him there; the jury were directed, that as the justification was not fully proved, they might give damages for the whole trespasses laid in the declaration.

Held, first, that the outer door being open was a condition precedent to the defendants' right to enter and arrest the plaintiff in his house; and that the averment in the plea was therefore material and necessary, so that it was properly traversed in the plea by the general replication *de injuriâ*, without any necessity to reply the breaking the outer door as an excess or an abuse of authority. Held also, that notwithstanding the warrant, the defendants had become trespassers *ab initio* by breaking the door, and therefore that the direction was right, even on the plea of not guilty only.

Pleas by *Warren and Western*, first, not guilty; secondly, to all the trespasses, except the breaking the dwelling-house, a justification under a *ca. sa.*, directed to the sheriff of *Devon*, and a warrant thereon directed to them among other officers, alleging that by virtue of such writ and warrant they entered the dwelling-house to execute the same, the outer door thereof being at that time open.

Pleas, by the *Denbys*, by a separate attorney; first, not guilty: secondly, by *William Denbey* alone, as to the trespasses, as the servant and by the command of *Warren and Western*, the bailiffs, a similar justification as that before pleaded: lastly, by *Edward Denbey* alone, as to the assault and imprisonment, that he committed such trespasses as the servant and by command of the said officers and bailiffs, in the preceding case mentioned, who at the time of committing the trespasses were acting under the authority and by virtue of the said warrant, and were then seeking and attempting duly and lawfully to take and arrest the plaintiff in the execution of the said warrant, to wit, by pointing out to the said officers the dwelling-house as place of residence of the plaintiff, and directing and accompanying them thereto, and that he did by command of the said officers and as their servant accompany them to the said dwelling-house of the plaintiff, and direct them thereto and point out to them the said dwelling-house &c. as he lawfully might, and did and not otherwise committed the trespasses in the case mentioned.

Replication to the special pleas of *Warren and Western*, and of *William Denbey*, that those defendants respectively of their own wrong and without the cause then alleged, except so far as the said cause related to the said writ and warrant, and to the said command alleged by *William Denbey*, committed the trespasses

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*Devonshire assizes*, when the following are the facts. A *capias* having issued against at the suit of *William Denbey*, was given. *Warren and Western* to be executed. On the evening of 14th *December* last they arrested *William and Edward Denbey* at the plaintiff's *Sidmouth*, and found the outer door locked. On the plaintiff's refusal to admit them they opened the door, entered the house, took them to an inn near for that night, and next day to *Exeter*. He was liberated in a few days on giving them. *William Denbey* was concerned in the door was doubtful on the evidence, the judge stated, that unless the justification was completely made out in all particulars, the case stood on the general issue only, so a verdict might be given not only for breaking the door but for the whole injury sustained. Verdict for *William Denbey* on his plea of not guilty, but on his special plea, and generally against the defendants, with 20*L.* damages. The judge gave leave to move to enter a verdict against the defendants *Warren and Western*, and for *William Denbey* on the special plea,

*Cromder* now moved according to the law



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admitted on the record, ought to have been replied (a), and cannot be made a subject of complaint on this state of the pleadings. [*Parke B.* The door being open seems a requisite to your defence.] The allegation of a breaking would be supported by proof of an unauthorized entry merely. The charge in the declaration is in truth not of breaking the outer door, but of a mere entry, and as such is sufficiently answered by the pleas showing the authority of the writ and warrant. They state the defendants to have entered the dwelling-house to execute the writ, "the outer door being open," but those words are mere form. [*Parke B.* Would the plea have been good without them?] Though all the precedents contain them, the omission would not make the plea demurrable, for if the plaintiff does not allege the door to be shut, the defendant need not show it was open. The charge in the declaration not being for breaking an outer door, the door broken may have been an inner one, the breaking of which would not be illegal (b). Here, the object of the alleged trespass by the defendant being to execute the process, the plaintiff had no right to prove the breaking the door on the replication *de injuria*, as he might have done under *Lucas v. Nockells* (c). Now, the breaking the door in this case was in execution of the authority (d), though in abuse of it; as striking the plaintiff in order to arrest him would have been. Then it should have been replied. *Price v. Peck and Others* (e) is in point. [*Parke B.* The sole question is, whether the defendants were justified in

(a) As to this point see the cases collected in Frazers' note to 8 Co. R. 146 a., new ed. Vol. IV. 432.

(b) See Tidd, 9th ed. 1012. and cases collected in Frazer's note to new edition of Coke's Rep. Vol. III. 188, note.

(c) 10 Bing. 157; see the judgment of *Parke J.*

(d) See 18 Ed. 4. 4. *contra*, cited 5 Co. 92. b.

(e) 1 Bing. N. C. 387.

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breaking a dwelling-house to execute a writ of *capias* on a defendant at the time he was in it. Is the fact of the outer door being open a condition precedent to the right of entering the house in order to execute civil process there at that particular time? The uniform course of pleading in such cases is, that the officers entered, the outer door being open, and is strong to show the allegation to be material (a). If they have only a conditional privilege of entering a house to execute process there, in case the door is open, that should be averred in the plea accordingly, and if so averred, could only be put in issue by the general replication, *de injuria*. Lord Abinger C. B. The right to arrest the plaintiff justified the entering of the house, not generally, but only if the door be open, and did not carry with it a right to break and enter the house. As the writ does not authorize the doing any thing to the house, the fact of the door being open is a matter of excuse, which should be pleaded accordingly.] It is submitted that the correct statement of the rule is, that the writ and warrant conferred a general right to arrest the defendant anywhere, even in his dwelling-house, except when the door was closed. [Parke B. Chief Baron Comyns adopts the terms in which Lord Coke states the rule, viz. that in all cases when the door is open the sheriff may enter the house of the defendant to do execution at the suit of a subject (b). These words seem to show that the writ confers no authority to enter a house at all to arrest a defendant there, unless on the condition of the door being open (c).] That passage only states the extent to which the law limits the privilege.

(a) See Co. Lit. 118 b.  
 (b) Com. Dig. hii. Execution, (C 5); 5 Co. 92 a., *Servage's case*.  
 (c) And see per Gibbs C. J. *Cook v. Birt*, 5 Taunt. 770; S. C. 1 Marsh. 339; *Johnson v. Leigh*, 6 Taunt. 247; S. C. 1 Marsh. 565; *Sheere v. Brooks*, 2 H. Bla. 120; and *Foster*, 320.

[*Parke B.*: This is not a mere abuse of the authority, but is an execution of it in a place and under circumstances where the defendants had it not; as if a writ directed to the officer of a liberty was executed by him out of the limited jurisdiction.] That would include all misconduct of officers in execution of process.

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Secondly, It was a misdirection to state that as the justification was not fully proved, general damages might be given in respect of the whole matter laid in the declaration, without taking into account the writ or warrant. For the gist of the complaint was the false imprisonment, and a legal cause of arrest was shown. The only illegal act was the breaking the door, which might be mitigated under the general issue by the other circumstances in evidence, had the judge drawn the attention of the jury to them.

Lord ABINGER C. B.—Where a party becomes a trespasser *ab initio* by reason of irregularity in his execution of authority given him by the law, he cannot justify at all, *Six Carpenters' case* (a). On that account the stat. 11 Geo. 2. c. 19. s. 19, enacted that a party distraining for rent should not be deemed a trespasser *ab initio*, by reason of any irregularity, but should only be liable to an action for the special damage thereby sustained. That is a legislative declaration of the rule which would otherwise prevail on the subject, viz. that if the justification of the distress failed in any point, the defendant would recover for the whole value of the goods. Had I tried the cause I should very probably have told the jury that defendants of this description, who, knowing the law, violate it, must take all the consequences, and should not be sparingly visited in damages. On the other point I

(a) 8 Rep. 146 a.

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should be unwilling, by granting this rule, to throw a doubt on that form of pleading which has been uniformly adopted. However, the court will give you a day or two's time to search the precedents, and if none are produced showing the justification to be good, without averring that the outer door was open, the rule must be considered as refused.

PARKE B.—I have always considered that the averment of the outer door being open, forms a material part of a plea of this description, by way of condition precedent to the executing a writ in a dwelling-house. If material, it is properly traversed by the replication *de injuria sua propria absque residuo cause*, and on that ground this rule cannot be granted.

The other barons concurred.

The case was never mentioned again, and the rule was

Refused.

#### GUTSOLE against MATHERS.

In a declaration for slander of the plaintiff's title to property, alleging special damage, the words must be set out in the declaration, so as to afford the defendant an opportunity to admit the uttering of the words, and then to bring before the court the question, whether their effect was slanderous or not.

CASE. The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, was lawfully possessed of divers large quantities of tulips, to wit, 20,000 tulips, then being the property of the plaintiff, and being of great value, to wit, of the value of 10,000*l.*, and he the plaintiff was then desirous of selling and disposing of the same by public auction, and for that purpose had issued hand-bills, announcing that they would be exposed to sale by public auction

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at No. 58, *George Street, Canterbury*, on 20th *May* 1835; yet the defendant, well knowing the premises, but contriving &c. to injure the plaintiff, and to cause it to be suspected and believed that the said tulips had been and were stolen from one *J. Mathers*, the brother of the defendant, and to hinder and prevent the plaintiff from selling and disposing of the same, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the said exposure to sale of his said tulips, and to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, heretofore, and before the exposure to sale of the said tulips, as hereinafter mentioned, to wit, on &c., wrongfully, injuriously, falsely, and maliciously asserted and represented, in the presence and hearing of divers good and worthy subjects of this realm, that the said tulips were stolen property. The second count stated that the defendant, further contriving and intending as aforesaid, afterwards, and before the exposure to sale of the said tulips, to wit, on &c., wrongfully &c. asserted and represented (a), in the presence and hearing of *H. P.*, *T. Y.*, *W. Y.*, and divers other good and worthy subjects of this realm, of and concerning the said tulips of the plaintiff, so then about to be exposed to sale by public auction as aforesaid, that the said tulips were the property of the defendant's brother, and that whoever bought the said tulips would buy stolen property, (thereby then and there meaning that the said tulips of the plaintiff were the property of the said *J. M.*, the brother of the defendant, and had been stolen from the said *J. M.*) A third count stated, that afterwards, to wit, on &c., the said tulips of the plaintiff were put up and exposed to sale by public auction, at No. 58, *St. George's Street, Canterbury*

(a) *Cook v. Cox*, 3 M. & S. 114.

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aforesaid, in the presence of divers and very many of the liege subjects of our said lord the king, in order that the same might be then and there sold for the benefit of the plaintiff: but by means of the committing of the said several grievances by the defendant as aforesaid, divers of the said liege subjects of our said lord the king, who were present at and upon the said exposure to sale as aforesaid, and who were then about to be and become purchasers of great part of the said tulips of the said plaintiff, and who might and would otherwise have bid for and purchased the same, and particularly the said *H. P.*, *T. P.*, and *W. K. (a)*, who were then respectively about to bid for, and who would otherwise have purchased a great part of the said tulips, were thereby wholly then deterred and prevented from bidding for and becoming the purchasers of the said tulips, or any part thereof, and then and from thence hitherto have wholly declined to purchase the same or any part thereof, whereby the plaintiff was then hindered and prevented from selling and disposing of his said tulips, and has thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but also thereby divers sums of money, in the whole amounting to a large sum of money, to wit, 20*l.*, which he the plaintiff was forced and obliged to and did necessarily pay, lay out, and expend, in and about the said exposure to sale, and expenses incidental thereto, became and was wholly useless and unproductive, and entirely lost to the plaintiff, and he the plaintiff hath been and is by means of the premises otherwise injured, &c.

Pleas: first, not guilty; secondly, that the plaintiff was not lawfully possessed of the tulips in the declaration.

(a) 4 Burr. 2423, 2424; 8 T. R. 330.

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tion mentioned, or of any or either of them, in manner and form as in the declaration alleged. Issue thereon.


At the trial before *Park J.* at the last summer sittings for *Kent*, it appeared that the tulips had originally belonged to *John Mathers*, the defendant's brother, a person of taste and judgment as a florist. They formed part of his residue bequeathed by him to his widow. She and the defendant were executors of his will. At her death she bequeathed them to the wife of the plaintiff. A part of them was taken possession of by another party, and some disputes arose respecting them. When they were about to be disposed of by her representatives, hand-bills were put forth announcing a sale by auction of the tulips late the property of *John Mathers*, deceased. Previous to the sale, the defendant, on being asked at a public-house if he knew any thing about them, said, "If the tulips are sold as my brother's property, whoever buys them as such, will buy stolen property, as I have never taken an account of or administered to it, but mind, I do not mean to say any one has stolen them." The plaintiff was informed that the defendant had said he the plaintiff stole the tulips. It did not appear that any thing was said at the sale to affect the title to them, or that the auctioneer knew any thing of what had been said; but in consequence of a report having got abroad that they were stolen, only two lots were sold, and a party who went to bid refrained from doing so. *Park J.* told the jury that the defendant's expressions would not maintain the declaration. Verdict for the plaintiff, 1s. damages. The judge refused to certify under 43 *Eliz. c. 6.* to deprive the plaintiff of costs.

In *Michaelmas* term *E. Perry* obtained a rule for arresting the judgment, on the ground that the words

PERSONS FROM LITIGATION, IN WHICH THE CHARGE IS THE GIST OF THE ACTION, AND THE WORDS THEMSELVES BEING THE VERY CAUSE OF ACTION, PROCEED ACCORDINGLY. WHEREAS THIS IS AN ACTION ENTIRELY ON THE SPECIAL DAMAGE (a) ARISING OUT OF SALE OCCASIONED BY THE DEFENDANT'S WORDS, NOT ACTIONABLE IN THEMSELVES; *Smith v. Parke* B. That, strictly speaking, was slander of title, but of malicious claimable cause, to a house put up to sale, was held to differ from the common action in several particulars. This evidence of the words used may be given under the gist of this action; *Watson v. Reynolds* (c). N. 21 Jac. 1. c. 16. as to the limitation of slanderous words; *Law v. Harwood* (d) the court say that this action is not maintainable without showing special damage, no more than an action for libel, where without showing special temporal loss, as thief, &c.; whereas an action for slander doth not import in itself loss of temporal loss, as that he could no longer use his lands. [Lord Abinger C. B. This mod-



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the court, whether the meaning of the words used be libellous or not (a). If the cause of action be as you contend, a special damage resulting from certain words used, must not the plaintiff show them to be such that that special damage would naturally result from them? *Parke B.* An action of slander of an heir at law, by calling him a bastard, may be supported without proving present special damage (b). Would it be sufficient to declare in such a case that the defendant asserted and affirmed that the plaintiff was a bastard? It is material on that account that the words should be set out, though their effect on the damages is another thing. The court is to decide on the meaning of words, not their effect, unless as far as it depends on writing. *Bold v. Bacon* (c) shows, that calling an heir at law about to sell an estate a bastard, is not actionable, unless directly spoken for the purpose of slandering the title. If the very words are to be set out in this form of action, they must also be stated in actions on the case for deceit and false representation of character. [Lord Abinger C. B. In an indictment for obtaining money by false pretences, the exact words used need not be stated. *Alderson B.* In *Hargrave v. Le Breton* (d), the words used by the defendant, an attorney, were not the same which the client had employed him to deliver, but varied in some immaterial particulars, and was held that it made no difference. It would seem, that had it been necessary to state the very words, that would not have been so held.] The words alone are not here the gist of the action, as in slander. This being an action on the case for special damage and not for slander, the defect, if any, is cured by verdict, and

(a) See *Wright v. Clement*, 3 B. & A. 503.

(b) *Humphreys v. Stanfield*, Cro. Car. 469; Jones, 388; Godbolt, 451, S. C.

(c) Cro. El. 346.

(d) 4 Burr. 2423.

*Hearn* (b) it was held, that a count for indicting the plaintiff for perjury without the indictment, is good after verdict. editors of *Saunders*, 5th ed. 228 a, n. 4 seems to have been by the statutes of; not suggested here that slanderous words but that the title to the tulips was defamatory. *Abinger C. B. Cook v. Cox* (c) was an action for imputing insolvency, and determines that a declaration in case for slander would be bad for not setting out the words complained of, as equally bad in arrest of judgment (d). Lord *Ellenborough* says, that the use of the word "asserted" there is not very grammatical, but that it has not been proved by evidence of words alone not accompanied with acts; but that it has been proved either by words alone in themselves, or by words not so accompanied with acts, as holding up an envelope and saying the like. Now the crime of felony may be proved without words, as by nodding or shaking the head. *Parks B. Imputing felony to a man by charging him with it before a magistrate of justice; Blizard v. Kelly* (e).]

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damage being all which would be requisite to be proved by a plaintiff. (Nothing in the report of *Wright v. Reynolds* (a) shows that the declaration did not allege the words to have been asserted without reasonable or probable cause. [Parke, B.] The effect of that decision is to show that this is not an action of slander in the common acceptance. By a charge of imputing felony to another, the defendant is taken to have placed the party charged in jeopardy, by accusing him falsely before a magistrate, from which charge damage is supposed to have resulted to the plaintiff. The words were the cause of the mischief and the wrong committed was the uttering them. If they were defamatory, it is not sufficient to state merely their substance; *Wright v. Clements* (b). In actions for deceit and misrepresentation, it is necessary to prove not only the falsehood, but the fraudulent intent of the assertion; per *Buller, J.*, *Pasley v. Freeman* (c). Unless the words used are set forth, it cannot be seen whether the defendant claimed an interest in the subject in himself, which he may legally do; *Gerard v. Dickinson* (d), *Pennyman v. Babank* (e). *Crush v. Crush* (f) shows that the court is to judge whether the words are a direct slander on the plaintiff's title or not. The state of pleading in more ancient times, when this action was more frequent, is shown by the precedents in the entries of *Coke* and *Lilly*, which set out the words used; *Gargham v. Grindley* (g). [Lord Abinger, G. B.] The distinction is between cases where the words used are incidental to the action, and where they are the mere foundation of the charge. Thus, in an indictment for obtaining money by false pretences, the

(a) *M. & M.* 11, 12. (b) 3 B. & Ald. 503.  
(c) 3 T. R. 51; *Haycraft v. Creasy*, 2 East, 92.  
(d) 4 Rep. 18, a.; Cro. El. 896, S. C. (e) Cro. El. 427.  
(f) Yelv. 80. (g) Yelv. 88.

arrest of judgment.] Had the plaintiff tulips in market-overt he might have them. Now, in *Hargrave v. Le Breton* (used must have been set out in pleading) turned on the authority. Lord Mansfield said expressly, that the words used must be a slander as goes directly to defeat the plea [Alderson B. The purport of the words must be true, whereas if set out verbatim they are actionable: e. g. if it had been thus: a defendant, the tulips were stolen from him; on the other hand, the words might be actionable "that the plaintiff was a thief and had stolen tulips" which would be equivalent to the general issue of the declaration. If a plaintiff in such an action omit the words used, he may secure a verdict by proving one shilling's worth of special damages, whereas if he sets out the words not actionable in themselves, and pleads a general issue, he is liable for slander of his character. [Alderson B. might allege a part of the words as a ground of special damage, whereas the whole, if set out, would be an action of slander so as to let in the rule of costs, where less than 40s. damages are awarded.] All the arguments for the plaintiff would be in favor of those actions for words which, though not actionable in themselves become so if they have

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is untouched, as to that part of it which decides that the damage must appear to the court to be the legal and necessary consequence of the particular words. Though the report of *Smith v. Spooner* does not set out the words used, *non constat* that they were not stated in the declaration. In *Pennyman v. Raban* (a), *Howe v. Roach* (b), and *Pitt v. Donovan* (c), the words used appear on the reports. Chief Baron Comyns, in his *Digest*, tit. *Action on the case for defamation* (C. 11), states the exact words on which an action for slander of title has been held to lie. This is strong to show that they were so stated. The precedents in *Coke* and *Lilly's Entries* contain the words of slander. *Watson v. Reynolds* has the aspect of a case of privileged communication. [Alderson B. Then it resembles *Hargrave v. Le Braton*. If it is not necessary to set out words of slander of title, their meaning is incidentally left to the jury without giving the defendant a previous opportunity to bring that question before the jury.] [Parke B. The defendant's claim of property must be taken to be *bona fide* till the contrary is shown.]

On a subsequent day the judgment of the court was delivered by

Lord ABINGER C. B., who, after stating the pleadings, proceeded as follows: It was argued for the plaintiff, that the general rule which requires the words or signs upon which an action of slander is founded, to be precisely specified in the declaration, applies only to cases where the person of the plaintiff and not his title to property, is the object of the slander; and that it did not extend to actions like the present, which must be supported by proof of special

(a) Cro. El. 427.

(b) 1 M. &amp; S. 304.

(c) 1 M. &amp; S. 639.

merely thrown out at nisi prius, and not a point ruled by him in that cause; and evidently founded on a mistake, as there are precedents in *Rastall*, as he is there represented that there were. *Nelson v. D.* Authority at all, is overruled by *Cook v. Cox*; any distinction of this kind, and appealing to sufficient authority in support of this rule, that damage is the only ground of action. In placing the slanderous words upon the record, and enforced, a defendant would be precluded from denying their legal effect before the court for action, viz. whether the words or signs appearing on the face of the declaration would bear out the charge ascribed to them by the innuendos or averments, in such a manner as to constitute a defence, which the defendant was bound to answer. In this form of action has been found that the words used have not been set forth. In this class of cases, in which the cause of action is done, as for instance, a false representation of character, or a deceitful statement in order to induce a party to part with money, a different rule applies. In those cases the complaint is not for words uttered, but for an act done; whereas the injury resulting from the use of certain words

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M'GAHEY, Vestry-Clerk of Saint Pancras, Middlesex,  
against ALSTON and Another.

**D**EBT upon a bond, dated 1st *January* 1834, given by the defendants to the directors of the poor of the parish of *St. Pancras* and their successors in the penal sum of 500*l.* The plea craved *oyer* of the bond and the condition. The latter recited that the defendant *Alston* had, in pursuance of the powers and authorities contained in an act of the 59th year of *Geo. 3.* intitled "An act for establishing a select vestry in the parish of *St. Pancras*, in the county of *Middlesex*, and for other purposes relating thereto," been elected and appointed an officer or servant of the vestrymen and directors of the poor of the said parish of *St. Pancras*, under the title and denomination of "Paying Agent and Accountant." The condition was for the faithful execution of such office, so that no loss, damage, or injury, should be sustained by the vestrymen or directors or their successors, or by the parishioners, in their moneys, &c., on account of the neglect, &c. of the said defendant *Alston*, and for the faithful accounting by him upon oath at the weekly and other meetings of the directors and their successors, and at all other times when required by the vestrymen and directors, for all monies received in the execution of the office &c. &c.; with a provision that the defendant *Alston* should, within ten days next after he should have been removed from or have quitted his said office, make up his accounts, and pay over any balance in his hands to the treasurer or clerk of the vestrymen or directors for the time being, and render up all books of account and papers to the vestrymen or directors, or their successors, or their clerk or clerks for the time being, &c. The defendants then pleaded, that, at the time of the

By the *St. Pancras Vestry Act* (59 *Geo. 3. c. 39. s. 19.*) the vestrymen (whose continuance in office is not limited to any particular period) are empowered to appoint the subordinate officers, and to remove them at their pleasure, and such officers are, by s. 57, to give bonds to the directors of the poor (who are annual officers) for the faithful discharge of their duties.

Held, that subordinate officers so appointed are not annual officers, and that the bonds given by them to the directors of the poor are not determined by the latter going out of office.

did, after the making of the said writin during the continuance in office of the tioned directors who were in office at making of the said writing obligatory, to time of making the same until the said *March* 1834, when the said last-mentio went out of the said office, well and fait the said office of paying agent and accot manner that no loss, damage, or injury can be sustained by the said vestryme parish, or by the said directors or their by the said parishioners, in their moneys, plea proceeded to aver performance du period of all the other matters mention dition.]

General demurrer, and joinder. One of law intended to be argued by the plair of the demurrer was stated in the marg murrer-book to be—that the office of and accountant" was not determined by of office of the directors who were in off when the bond was executed by the defe

*Peacock* in support of the demurrer held by the defendant *Alston* is a co and is not merely co-extensive with tl



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cular period. By s. 19. the vestrymen, or the major part of them, assembled at any meeting, are to appoint the subordinate officers deemed necessary for the purposes of the act; to direct such security to be taken for the due execution of such offices as they shall think proper, and they are authorized to remove all such officers at their will and pleasure, and to revoke, countermand, and vary their appointments. It appears, therefore, that the defendant was an officer appointed by the vestrymen, and not by the directors, and that his office was for an unlimited period, determinable at the pleasure of the former. By s. 41. the vestrymen are annually in *Easter* week to appoint from among themselves directors of the poor, who are to continue in office only for one year, and until other directors are named in their stead. Contrasting that section with s. 19. it clearly appears that where the officers are intended to be annual, it is so provided by the act in express terms. Under s. 57., indeed, all bonds are to be given to the directors, as trustees for the parish, but that does not invest them with the appointment of the officers. [*Parke B.* Does the recital in the bond mean, that the directors joined in this appointment only in their character of vestrymen?] It is not stated that the defendant *Alston* was appointed by the directors, but only that he had been elected an officer “of the vestrymen and directors of the poor,” and he was to a certain extent the officer of the latter, for by s. 21. he is to account to them. It is submitted that this was an appointment by parties whose own office is permanent, and that it was made for an unlimited time, and was not determined by the going out of office of the then directors of the poor.

*Tomlinson contra.* According to the principle of the decided cases, the court, in favour of a surety, will lean

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o the construction, that the office and the obligation are limited. The question here is, whether the act contemplated the appointment of the subordinate officers for a longer period than a year. By s. 19. the salaries are to be paid "yearly or otherwise." The argument for the defendants is, that such officers are the mere deputies or servants of the directors, and not of the whole parish; for it seems to be assumed in the act, that they are to go out of office with the existing directors. By s. 21. the officers are to account monthly, and within ten days after quitting office to deliver up their books and pay over their balances to the directors *for the time being*. By the recital in the bond the defendant *Alston* is stated to be the officer of the vestrymen and directors, who are there distinguished from the directors for the time being. If he be the servant of the vestrymen and directors, when the latter go out, an integral part of the body being gone, the obligation ceases. [*Alderson* B. You say that his office determines when the directors go out. Lord *Abinger* C. B. Suppose he is appointed a week previous to the directors quitting office, does he go out at the end of the week?] Yes, the defendants contend that he is merely the personal servant of the directors, and his office expires with their's. The word "successors" does not extend the obligation beyond the persons to whom it is given, being applicable to the successors of such directors as may die or be removed in the course of the year.

Lord ABINGER C. B.—It appears to me that the defendants have no case either on the words of the bond or of the statute. If every appointment is to be renewed at the end of the year, an onerous duty would be imposed upon the parish officers.

PARKE B.—The decisions must go much further to  
 shew the present case.

BOLLAND and GURNEY Bs. concurred.

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### Judgment for the plaintiff.

**DOERO against KEEN and Another, Executors of  
 GEORGE KEEN, deceased.**

**DEBT.** The plaintiff declared, as clerk to the trustees of the *Lambeth* watching and lighting act, (10 Geo. 4. c. cxxix.) on a joint and several bond, dated the 10th July 1833, given by George Keen, deceased, and J. R. Pavey and W. Pugh to seven of the then trustees for putting the said act in execution, on behalf themselves and the other trustees appointed by the act, in the penal sum of 400*l.*, to be paid to the said trustees thereinbefore named, or the survivor or survivors of them, or their or his attorney, executors, administrators, or assigns.

The plea craved *oyer* of the bond and condition; the latter recited that at a meeting of the trustees for putting the act into execution on the 10th of July 1833, the said Pavey having been required to give good and sufficient

security after the next annual day of election of trustees, at which he was capable of being re-elected. The condition of the bond was, "if the said P. do and shall from time to time and at all times hereafter, during such time as he shall continue in his said office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority or with the consent or acquiescence of the said trustees or their successors, to be elected in the manner directed by the said act, &c., duly &c. execute &c. the said office, and use best endeavours to collect, &c. the rates, &c. during the present or in any subsequent year, &c."

It was shewn, that the obligation of the bond was not limited to the year or period for which the collector was originally appointed, but extended to all subsequent years during which he continued to hold the office.

A bond was given for the faithful performance of the office of collector of parochial rates appointed under a local act of parliament by trustees who were a fluctuating body, one-third going out every year; the act providing that such collector should hold his office no longer than until the next meeting of the

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security by entering into a bond, with two sureties, in the penalty of 400*l.* for the due execution of his said office, and for duly accounting for the moneys to be collected and received by him therein, and otherwise as thereafter mentioned, had agreed to give such security, and had accordingly, with the said *Pugh* and *George Keen*, entered into the above bond. The condition was, that if the said *Pavey* should, from time to time and at all times thereafter, during such time as he should continue in his said office of collector, whether by virtue of his aforesaid appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority or with the consent or acquiescence of the said trustees, or their successors, to be elected in the manner directed by the said act, or any seven or more of them, duly, attentively, and faithfully execute and perform the said office, and use his best endeavours to collect, get in, recover, and receive the rates and assessments which should or might at any time or times thereafter, during the then present or any subsequent year, be made under or by virtue of the said act of parliament, &c., &c., (the condition contained various other stipulations for the faithful performance of the office, payment over of money, keeping correct accounts, &c.,) the bond should be void, or otherwise should remain in full force and virtue. The plea then alleged, that the said office of collector in the condition mentioned, was the office of collector of the rates and assessments constituted and mentioned in and by the said act of parliament; that after the making of the act, and before the making of the said writing obligatory, to wit, on the 1st *July* 1833, the said trustees, by writing under their hands, in manner and according to the provisions of the said act, did appoint the said *Pavey* to the said office of collector in the condition mentioned, and under and by virtue of that appointment he remained and continued

in the said office until and upon a certain day, to wit, the 10th day of *July* 1834, being the next meeting of the said trustees after the next annual day of election of such trustees, as in the said act mentioned, when the said office, and duties, and employment of the said *Pavey* therein ceased and determined.

The plea then proceeded to aver performance of all the stipulations of the condition "during the said time that the said *Pavey* remained in the said office of collector as aforesaid."

Replication, that after the said *Pavey* had been so appointed to the said office of collector, as in the plea mentioned, and after making the said writing obligatory, and after the first year of his employment and duties in the said office had ceased and determined, and before the commencement of this suit, to wit, on the 9th of *July* 1834, the said trustees, at a meeting then duly held in pursuance of the said act of parliament, did, by writing under their hands, in the manner and according to the provisions mentioned and contained in the said act of parliament, re-elect and re-appoint the said *Pavey* to the said office of collector in the said condition mentioned, and the said *Pavey* did then accept the said office in pursuance of such re-appointment, and continue to be and was retained and employed as such collector, by the authority and with the consent and acquiescence of the said trustees, from the time of his re-appointment until the 10th of *June* 1835. The replication then averred, that after the re-appointment of *Pavey*, and while he held the said office, and was so retained and employed therein as aforesaid, to wit, on the 11th of *July* 1834, and on divers other days and times between that day and the time when he finally ceased to be employed on such collection after the said re-appointment, he collected

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and received divers sums of money on account of the rates, amounting in the whole to 132*l.* 14*s.* 9*d.* which he had not paid over, and which remained still unpaid.

Special demurrer, assigning causes, which however were abandoned on the argument. The ground of demurrer stated in the margin of the demurrer-book was, that the objection of the bond only extended to the faithful performance by *Pavey* for one year. Joinder in demurrer.

W. H. Watson in support of the demurrer. This obligation ceased when the said office to which *Pavey* was originally appointed determined, which was on the 10th of *July* 1834. By the clause of the act under which he was elected (s. 13.), the trustees are empowered to appoint the officers, who shall hold their offices and appointments no longer than until the next meeting of the trustees after the next annual election of trustees, at which, or at any subsequent meeting, it is provided they may be re-elected. There are, therefore, two ingredients in the present case; first, the officers are to hold office only for one year; and secondly, the trustees are a fluctuating body, one-third of them going out annually, so that the whole body is renewed every three years; and according to the principle of the decided cases, this bond is satisfied by a performance for one year. [*Parke B.* How do you get over the words, "by virtue of his aforesaid appointment, or of any re-appointment thereto?"] They may mean a re-appointment in the course of the year, should the first appointment prove invalid. The argument on the other side must go the length of contending, that if there was an appointment for a year, then a cessation for a second year, and after which the party was re-appointed, that the latter appointment would be covered

the bond. [*Alderson* B. That would not be a re-appointment, it would be a fresh appointment. *Parke*. The words of the condition are, "during such time he shall continue in the said office."] When the office is annual, in order to make the bond continuing the words must be explicit; here there is a difference between the act and the bond, the former speaks of election and re-appointment, and the latter only of appointment. In all the cases great importance has been attached to the words "said office." In the *Liverpool Waterworks Company v. Atkinson* (a), where the defendant had agreed to collect the revenues of the plaintiffs "from time to time for twelve months," with a subsequent stipulation that "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed," he would use due diligence in collecting all rents which should annually grow due to the company, and justly account, &c.; the obligation was held to be restricted to the period of twelve months. Lord *Ellenborough* there attached great weight to the words "said office," and such his employment," as referring to the terms of the writ. In *Hussell v. Long* (b) a bond for the due payment of moneys by a collection of land-tax, was held to be confined to the current year for which he was, at the date of the bond, collector, although it did not appear on the condition that he was only appointed for one year; it being shown by the plea that the office was annually voted, notwithstanding it also appeared in the replication that he continued to hold it for a number of years. *Pepping v. Cooper* (c); and *The Wardens of St. Saviour's v. Bostock* (d) are decisions to the like effect. [Lord *Abinger* C. B. It is not disputed that something must appear on the face of the bond to

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(a) 6 East, 507.

(b) 2 M. & S. 363.

(c) 2 B. & Ald. 431.

(d) 2 N. R. 175.

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show that it is to continue beyond a year. *Bolland B.* It appears to me that the words "said office of collector," used here, are only descriptive. *Parke B.* The authorities cited fall very far short of the present case. To support your argument you must take out the words "or in any subsequent year;" for how can you, upon your construction, satisfy these words? It is clear that they mean a re-appointment in some subsequent year.] *Pavey* was appointed on the 10th of *July* 1833, and the words mean the following year into which his appointment extended. [*Parke B.* That will not do, for the expression is "any subsequent year." It would be difficult to use stronger language than is used here. *Alderson B.* According to your construction you must also reject the words "and their successors."] These words have been rejected in all the cases. [*Alderson B.* That was because in these cases fresh trustees might be appointed on the death of any during the year, but there is no such clause in the present act.] According to the act the office of collector is not merely one of appointment but of election. The words "any subsequent year" are used only with respect to the collection of the rates, and if inconsistent with what has gone before they ought to be rejected.

Lord ABINGER C. B.—I am of opinion that the words "said office" are used with reference to the nature of the office, and not with respect to its continuance. It has been intended here to save the expense of a new bond in case of a re-appointment to the office.

PARKE B.—There is not the slightest doubt that this bond was meant to apply to all the years that *Pavey* might continue to hold his office; whether it would be applicable to a case where there was a cessation in the

employment, and then a re-appointment, we are not called upon to consider.

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BOLLAND and ALDERSON B's. concurred.

Judgment for the plaintiff.

R. Hayes appeared to argue against the demurrer.

WELLS against ODY.

CASE. The declaration stated, that the plaintiff was possessed of a certain messuage or dwelling-house, situate &c., and carried on therein the trade of a coffin maker, in which messuage were divers ancient windows through which the light ought to enter; that the defendant, intending to injure the plaintiff in the enjoyment of the said messuage, theretofore, to wit, on the 1st of *April* 1834, and on divers other days and times, &c., wrongfully erected and built a certain building, to wit, a workshop, near to the windows of the plaintiff in his said messuage, and kept and continued the said erection and building so as aforesaid built for a long space of time, &c. And also, on the 1st of *April* 1835, kept and continued a certain other building near to the windows of the plaintiff in his said messuage. By means of which said grievances, the plaintiff was prevented from using his said messuage as he otherwise could have done: concluding with an averment, that in consequence thereof a lodger in the house had given notice to quit. Plea, not guilty.

The building act, 14 Geo. 3. c. 78. s. 43., authorizing the raising or rebuilding of a party fence-wall, does not protect a person from liability in respect of collateral damage resulting from the erection so made; and an action on the case may be maintained by the owner of the adjoining house for heightening a party-wall, whereby his lights are obstructed.

Where an injury results, partly from an act of trespass,

and partly from an act which is not a trespass, if both acts are done together, the plaintiff may maintain either an action of trespass, or an action on the case alleging consequential damage.

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At the trial before *Parke* B., at the *Middlesex* sittings after last *Hilary* term, it appeared that the plaintiff was the occupier of a house in *Drury Court, Strand*, to which there was a yard terminated by a party-wall, which divided his premises from the defendant's; that the latter had raised the party-wall, and had erected a workshop and a stable up to and upon the wall so raised, the effect of which was to darken the plaintiff's windows. A former action had been brought in trespass, in which, as it appeared that the defendant had acted *bonâ fide* under the provisions of the building act, 14 *Geo.* 3. c. 78., and that the plaintiff had not given the notice of action required by the 100th section of the statute, the plaintiff was nonsuited (a) The present action was brought for a continuance of the erection, and a notice had been given, which was objected to, on the ground that it stated an action would be begun "forthwith," instead of twenty-one days after the notice. For the defendant it was contended, that he was not liable to this action, being protected by the building act, the 100th section of which provides, that an action must be commenced within six months from the time of the act committed, whereas a period of fifteen or sixteen months had elapsed before the bringing of the present suit. This objection being overruled, it was further contended on the part of the defendant, that, as the building was partly on the plaintiff's ground, the form of action should have been trespass and not case. The learned judge put it to the jury to say whether the plaintiff's enjoyment of the light was more diminished than it would have been, had the building been erected on the defendant's moiety of the wall only. The jury having answered in the negative, a verdict was taken for the

(a) See 5 *Tyr.* 725.

plaintiff, with leave for the defendant to move to enter
consuit.

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Kelly, in the early part of the present term, obtained
rule accordingly, against which,

Bompas Serjt. *Humfrey*, and *Barstow* now showed
use. The first question is, whether the defendant
protected by the building act, 14 Geo. 3. c. 78, s. 43.,
hereby it is enacted, "that any party fence-wall now
built or hereafter to be built, may be raised by and at
the expense of the proprietor or occupier of the ground
on either side adjoining thereto; but no party fence-
wall shall hereafter be built upon or against, or used as
a party-wall, unless the same be of the materials,
height and thickness hereinbefore directed for party-
walls to the rate or class of buildings so to be erected
against or upon the same. And in case of the insuffi-
ciency of such wall for the purposes aforesaid, or if,
instead of such party fence-wall, there be only a
wooden fence, the proprietor or occupier of either of
the adjoining premises shall be at liberty, at his own
expense, to take down such wall or fence, and erect a new
party-wall in lieu thereof, making good every damage
that may accrue to the adjoining premises by such re-
building; so nevertheless as that such new party-wall
shall not extend on the surface of such adjoining ground
more than seven inches beyond the centre line of such
party fence-wall or fence; but no proprietor or occu-
pier of such adjoining premises shall make use of such
party-wall otherwise than as a party fence-wall, unless
he, she, or they pay a proportionable share of the
whole expense of erecting such parts of such wall ac-
cording to the use he, she, or they shall make of the
same, at the rates aforesaid." The principal object of
the above clause, and of the whole statute, was to se-

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cure substantial walls between different premises, so that fires might be prevented from spreading; and in no part of the act does it appear that the legislature intended to interfere with private rights, further than was necessary to effect that object. In order to make a party-wall of sufficient thickness, the statute gives a person the right of going on his neighbour's land, which he otherwise could not do, but it is not to be understood as authorizing him to raise the wall to any height, and block up his neighbour's windows. The duty of the surveyors appointed under the act, is only to see that the wall is of the proper width, and not to take care that the party does not injure his neighbour. There is no clause in the statute containing provisions with respect to rights like the present; it only says in effect, that if the party is entitled to build on the party-wall, he may place one moiety of the wall on the adjoining property. There are many party-walls in *London*, which, if built upon, would exclude the light from numerous windows. The 100th section protects a party only for what he does in pursuance of the act. Where a party builds a house, he does not erect it in pursuance of the act; but if he has a right to build it, then the act requires the party-wall to be of a specified thickness. [*Parke B.* Your argument is, that the act protects a person in building on a party fence, so far as he builds on his neighbour's property, but it does not protect him in blocking up lights, and that inasmuch as the act prevents trespass from being brought for building on his neighbour's ground, the remedy of the latter is case for an injury to his lights.] It is contended that the present case is not within the building act at all, and that it is one of those injuries for which a party may bring either case or trespass. In *Titterton v. Conyers (a)*, it was held, that the defendant was not

(a) 5 Taunt. 465.

protected by the act, which had not destroyed the right of lateral windows. *Gibbs* C. J. there says, "we are nearly of opinion that, notwithstanding the building act, the plaintiff's right to his lateral lights remained." Lord *Abinger* C. B. Suppose a party was to build a wall of improper materials? A party guilty of a mere breach of the regulations of the act may be protected, but it is submitted that this case is not within the statute. With reference to the form of the action, there are many instances in which a party may waive the trespass and proceed for the consequential damage which he has sustained, as in *Branscomb v. Bridges* (a), and *Smith v. Goodwin* (b). Those cases relate only to personalty, but it is apprehended that the principle is the same where the injury has been to realty.

Another objection is, that even although the action is maintainable, it should have been brought within three months, pursuant to the 100th section of the act. This case, however, is distinguishable from *Wordsworth v. Harley* (c), cited when the rule was moved, for in that case there was no continuing injury. So in *Lord Oakley v. The Kensington Canal Company* (d), the injury took place when the wall was built. But where the action is brought for consequential damage sustained within the three months before it was commenced. It is similar to the case of *Roberts v. Read* (e), where the wall, though undermined before, did not fall till within three months before the action was brought, and there it was held, that the action, being for the consequential damage, was commenced in due time. *Sutton v. Clarke* (f) is to the same effect.

Kelly, *Adolphus*, and *R. V. Richards* in support of the rule. In no case can the laying of bricks and other

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(a) 1 B. & Cr. 145.

(b) 4 B. & Ad. 413.

(c) 1 B. & Ad. 391.

(d) 5 B. & Ad. 138.

(e) 16 East, 215.

(f) 1 Marsh. 429.

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incumbrances on the land of another be the subject of any other action than trespass. The jury have in substance found that the defendant has erected the wall partly on the plaintiff's premises, and partly on his own, and that the injury does not result from the part on the defendant's, but from that on the plaintiff's land. Independent of the statute, therefore, it is clear trespass alone is maintainable. The object of the act is to enable a building which is a nuisance to be removed; but here the jury have not found that the wall is a nuisance, and if the defendant were to pull down the moiety of it on his own land, the injury would still remain the same. Supposing the plaintiff to remove the portion upon his premises, then indeed the part on the defendant's land might do him an injury, but it would be a different one from that complained of here. Therefore, unless the building act alters not only the rights of parties but also the forms of pleading, this action is not maintainable. It is admitted by the other side, that where all the injury results from an act which is a trespass, this action cannot be supported; but it is said that it may, where the injury arises from an abuse of the privileges of the statute. Even if that be so, the declaration should have been specially framed, and then the defendant would have known the charge he had to meet. But the law knows no such distinction,—for whether the act done be protected by the statute or not, the forms of pleading remain the same. The fallacy arises from confounding that which is a trespass, but is justified by the statute, with that which is no trespass at all. A party may have a justification for the act done, but it is still a trespass. Suppose a statute gives a party authority to do certain acts on the land of another, which he does in an improper manner, the plaintiff must still bring trespass, and what is done exceeding the powers given by the statute should form the sub-

t of a new assignment. For instance, if the party d built ten inches of the wall upon the plaintiff's land instead of seven, but had done it under the superintendence of the surveyor, that would be a trespass, and on the statute being set up, the excess might be replied. It is submitted, that unless the whole of the injury arises from that which is the subject of an action in the case, that action will not lie. [*Parke B.* Here the cause of action is of a compound nature, partly resulting from the act done, and partly from the injury committed. The act is partly the subject of an action in trespass, and partly of case, and the question is, whether you cannot maintain either action for it.] Where a party erects a nuisance, equity will restrain him from continuing it; but how can the defendant be restrained from continuing this wall, which he could pull down without committing a trespass? For on the wall being built, the plaintiff and defendant did not become tenants in common of it, and of the land on which it stands; *Matts v. Hawkins* (a). That case shows that trespass is the proper form of action. [*Parke B.* You will find a case in *Com. Dig. Action for a Nuisance* (A.), where that action was held to lie for a nuisance to the habitation or estate of another, as where a man builds a house hanging over the house of another, whereby the rain falls upon it. That, according to the strict rules of law, is a trespass.] In *Pickering v. Rudd* (b) Lord Ellenborough seems to have held the contrary. [*Parke B.* No, he thought it might be a nice question, whether in that case trespass was maintainable.] It is submitted that either the statute justifies the act or it does not, and if it does not alter the nature of the remedy. Secondly, the question is, whether the statute is not

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5 Taunt. 20.

(b) 1 Stark. 56.

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a complete justification, and whether, under the 43d section, the defendant was not authorized to do that which he has done. If the act empowers him to build the wall, it, by necessary implication, justifies the consequential injury therefrom arising. [Parke B. Surely, the act never could have intended that a party might build up a fence wall to any extent, regardless of the injury he might inflict upon his neighbours. The statute does not appear to have considered the rights of adjoining parties, they are not adverted to at all. It seems to allow a person to use his neighbour's half of the wall as his own, and if so, he is liable for any act done upon it, the same as if it was committed on his own land.] If the wall is not protected by the statute because it obstructs the plaintiff's windows, it would be a good replication to say it was an illegal wall, so far as it obstructed such windows. [Parke B. Suppose the wall to belong to a building in which an offensive trade is carried on, but which does not become offensive until after three months are elapsed, is the plaintiff to be without remedy? Is not that a strong illustration to show that the act has nothing to do with the consequences resulting from the wall?]

Thirdly, supposing the court think that this action will lie, the question is, whether the limitation of three months does not apply to the time when the act was done. A distinction has been attempted between a continuing injury, and one that is complete when the act is committed, but the authorities show that there is in truth no difference; *Pratt v. Hillman* (a), *Lloyd v. Wigney* (b). [Parke B. What do you say would have been the extent of damages which the plaintiff would have recovered if he had brought his action within the three months?] For the time that had elapsed from

(a) 4 B. & C. 269.

(b) 6 Bing. 489.

the act done. [Parke B. Then he would have recovered no damages for the future. Is not that a strong argument to show that the act could not be meant to apply to such a case? To render the statute applicable, you should make out that under it the plaintiff might have recovered the difference in value between a house in which the lights are obstructed and one in which they are not.]

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LORD ABINGER C. B.—The chief doubt in this case was raised by the finding of the jury. This is an action on the case brought by the plaintiff for obstructing the lights. The first answer attempted to the action is, that the wall was erected partly on the property of the defendant, and partly on that of the plaintiff; that the jury have in effect found that the obstruction is as great from the erection on the plaintiff's land as from that upon the defendant's, and consequently that the remedy should be trespass. No case has been adduced to show, that where a consequential injury has been done, partly by an act of trespass, and partly by an act which is not a trespass, from either of which the injury would have resulted, that the plaintiff is bound to adopt one form of action or the other. I can see no reason to prevent him from bringing trespass for the part of the wall built upon his own ground, or case for the part upon the defendant's land. If he cannot bring case, because part of the wall is on his own land, he cannot maintain trespass, because the other part is on the defendant's premises. Therefore, if the argument be good for any thing, he cannot support an action at all. It appears to me that the plaintiff may bring either trespass or case. Suppose a person's enjoyment of a watercourse to be interrupted by the erection of a weir placed partly on his own land, and partly on the land

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of another; the part erected on his own land would be the subject of an action of trespass, and the other portion of case; yet if both acts were done together, it seems to me that the plaintiff might bring an action on the case for the injury, alleging the consequential damage. There are not wanting analogies to show that a party may resort to either remedy, as, for instance, in the case of a nuisance, where the act being committed in one county and the effect produced in another, the venue may be laid in either county. The argument which has been urged is specious, but will not bear investigation, and the result is, that the party may maintain either action. It has been contended, however, that the plaintiff did not sustain any injury from the portion of the wall built on the defendant's land, and that this has been in effect found by the verdict of the jury. But the jury never meant to say so, nor could it be the case, unless the part of the wall on the defendant's ground was transparent. The verdict must be taken to mean that both portions of the wall produced the injury, and each equally with the other. A second objection is, that the injury complained of is justified by the building act, or if not, that the defendant is protected by the want of due notice of action. It appears to me, that neither of these positions can be maintained. The building act was intended to prevent any action of trespass or case from being brought, provided its directions were complied with. But it was not meant to apply to cases never contemplated by it at all, or to collateral injuries, but to injuries immediately resulting from the acts done under its provisions. If an injury results from any thing incidentally done in the progress of the work, the act may apply, and a notice be required, in order to allow parties an opportunity of offering compensation. In what manner would a party

proceed for an act which he thought not justified by the statute? He would bring trespass, and if the act done could not be justified, the statute could not be pleaded in bar at all. If it could, but the wall was to be of a certain thickness, the plaintiff might reply, ~~that~~, such wall was not built pursuant to the provisions of the statute. But in the present instance, where the party-wall is raised, the act prescribes no limit to the height of the wall whatever; and if the case was within the statute, it could not be said that the party has in any particular point exceeded the authority of the act. It appears to me, that the building act only authorizes a party to do with his neighbour's wall that which at common law he might have done with his own, but it never was intended to justify a nuisance. I think, therefore, that this is not a building contemplated by the act, and no notice of action was requisite. Suppose a party were to raise a fence-wall, and place a chimney in it, and three months elapse, and he then lights a fire, is his neighbour to be prevented from bringing his action, which he could not do until the nuisance was created by kindling the fire? Those injuries which are the direct and necessary consequences of acts done in pursuance of the statute may be justified, but not such collateral injuries as the present. This rule must therefore be discharged.

PARKE B.—I concur in the view taken of this case by the lord chief baron, and agree with him that this rule should be discharged. The first question is, whether this case is within the building act at all, so as to entitle the defendant to a verdict under the general issue? The second is, supposing the case not to be justified under that statute, whether the plaintiff should not have brought his action within three months,

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and have given due notice thereof? Without stopping to inquire at what time the cause of action arose — though I am much inclined to concur with my brother *Barnes*, and disposed to think the notice was sufficient — I am of opinion that this case is not within the building act at all; that it has nothing to do with the object of the act, which was to protect buildings from fire; and as incident to that object, the 43d section was enacted. [His lordship here read the clause.] The intention of this section was to enable the proprietor of a house to make a more complete party-wall, and as he could not do that without legislative authority, it empowers him, in order to form the moiety of the wall, to use seven inches of his neighbour's land as his own. (The wall is to be built of certain materials, and there the object ends. It has no reference whatever to any eventual damage that may be caused by the wall being injurious to the adjoining property. If it should prove, either from the mode in which it is constructed, as being built too high, or from any other cause, a nuisance, it is not within the building act. It is then the same as if the wall had been built on the party's own land. There is no necessity, therefore, to consider at what time the cause of action accrued, and the form of the notice. The question then arises, whether an action on the case can be maintained? And I think it can, on two grounds. The first is, that this is an act incapable of severance, being committed partly on the plaintiff's land, and partly on the defendant's, so that it cannot be separated; and it seems to me that case is the more natural remedy to recover damages for the injury sustained. Besides, the instance put by the lord chief baron, in which there is a deviation from the common law in a plaintiff being allowed to bring his action either in the county

where the nuisance is erected, or where the injury is done; there are other cases in which a plaintiff has an option of bringing either trespass or case; as where a carriage is damaged by an immediate act of negligence, either action may be maintained; *Moreton v. Hudders* (a), *Williams v. Holland* (b). There is no other case which bears strongly upon the present in *Town's Dig. Action upon the case for a Nuisance* (A.) where it was held, that if a man building a house overhanging another, so that the rain falls upon the latter, an action on the case may be maintained. It is clear that if a house overhangs another, the projection is a trespass, yet in this old authority it was decided that it would lie. So here, though the act is partly a trespass, yet as the effect altogether is a consequential injury, the plaintiff may maintain an action on the case. In the instance put by the lord chief baron of the exchequer, as the effect is to disturb the plaintiff in the enjoyment of his watercourse, he may bring case, though trespass partly contributed to the injury. I think that here, case is the more appropriate remedy, though trespass might possibly lie. I am also of opinion, even though the injury had wholly resulted from the part of the wall on the plaintiff's land, that case might still have been maintained. Further, if I am correct in holding that the building act gives a party the right to use his neighbour's land as his own, the plaintiff could only recover damages for the injury done to his premises. On these two grounds I am of opinion that an action may be maintained.

HOLLAND B.—I am of the same opinion. I shall

(a) 4 B. & C. 223.

(b) 10 Bing. 112; 3 M. & Scott, 540.

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confine myself to the point, whether the case is within the building act. On looking at the 43d section it will be found that it was introduced solely with the view of regulating the way in which buildings in the metropolis are to be constructed. It consists of two branches: the first relates to the manner in which party-walls are to be erected, and it gives a person the right to raise a party-wall, provided it is built of the materials and of the thickness required by the act. The clause then goes on to provide for a case in which the existing party-wall is insufficient, and under this second branch a person is entitled to rebuild the wall, but he is not to extend it into the adjoining ground above a certain space. It then proceeds to regulate the enjoyment of the wall, and enacts that no one shall make use of it otherwise than a party-wall, unless he has contributed to the expense of its erection. The whole clause is confined to the construction and enjoyment of the wall. It does not contain one word as to any injury which may result to any other building, and therefore it leaves the question wholly open as to whether this wall is built of such a height as to obstruct the plaintiff's lights. It seems to me, therefore, that the present case is not within the act.

Rule discharged.

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Piggott against Birtles and Another.

CASE. The first count of the declaration alleged that the defendants had distrained the cattle, goods, chattels, and growing crops of the plaintiff, to wit, two horses, two ploughs, thirty tons of hay, &c. &c., and six acres of wheat growing on the plaintiff's land, of much greater value than the arrears of rent due. The second count was for taking and distraining beasts of the plough, there being without them other goods and chattels of the plaintiff on the premises sufficient for a reasonable distress for the said rent. The third, fourth, and fifth counts were for certain alleged irregularities in the selling and disposing of the distress. The sixth count was for distraining when no rent was due. The seventh count alleged, that on the 27th March 1835, the defendants had distrained and taken certain goods and chattels of the plaintiff, and certain growing crops, to wit, thirty acres of wheat, which were and would have been more than sufficient to cover the rent then due, and the costs attending the distress: that they sold the goods and chattels, and retained possession of the growing crops on which the distress still continued, and that the same, when ripe, would be more than sufficient value to satisfy all deficiencies in the sale of the goods and chattels in respect of the rent and the charges of the distress: yet that the said defendants, on the 5th of April, in the year aforesaid, wrongfully and vexatiously made a second distress upon the cattle, goods, and chattels of the plaintiff for the arrears of rent, and sold the last-mentioned


A landlord is liable to an action on the case for an excessive distress, where the excess consists wholly in seizing crops growing, the probable produce of which is capable of being estimated at the time of seizure.

replevied, a compensation for the additional expense and inconvenience of replevying to a larger amount.

An action cannot be maintained for distraining beasts of the plough, where there is no other sufficient distress on the premises except growing crops; for a landlord has a right to resort to the subjects of distress which are *immediately* available to satisfy the rent by sale.

The measure of damages, however, is not the value of the crops beyond the amount which ought to have been taken, but the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take, with some compensation for the loss of the absolute ownership and power of disposition thereof; and if the tenant

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goods, and converted the proceeds thereof to their own use. The eighth and ninth counts were for certain alleged irregularities in disposing of the second distress. There was a tenth count in trover.

Pleas: first, not guilty to all the counts except the seventh; secondly, to the first count, that the goods, chattels, and growing crops were not of greater value than the arrears of rent; thirdly, as to the second count, that there were not other goods and chattels on the premises, besides the beasts of the plough, sufficient for a reasonable distress; fourthly, as to the sixth count, that there was rent due; fifthly, as to the seventh count, the defendants pleaded payment into court of the sum of 60*l.*, and that the plaintiff had not sustained damages to a greater amount. The sixth plea, which was to the count in trover, is immaterial.

The replication to the fifth plea took issue on the sufficiency of the sum paid into court.

At the trial before *Williams J.* at the last *Shropshire* summer assizes, the following facts appeared in evidence. The plaintiff rented a farm called *Bastock Hall*, belonging to the defendant *Birtles*, in respect of which half a year's rent, amounting to 14*l.* 10*s.*, became due on the 25th of *March* 1835. On the 27th the landlord put in a distress, under which he seized two beasts of the plough, a stack of hay containing twenty tons, and other goods and chattels, as also the growing crops of wheat upon three fields, consisting of about twenty-five acres. On the 2d of *April* following, the cattle and goods were sold by auction, but did not raise sufficient to satisfy the rent due. Two days afterwards, the landlord, who still retained the distress on the growing crops, made a second distress, which was also sold without satisfying the arrears of rent. Several witnesses were called for the plaintiff, who spoke to the value of the growing crops of wheat when they

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Present!

at

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was distained. At the trial it was contended, on the
 side of the plaintiff, that as at the time of the first dis-
 tress the growing crops of wheat were capable of being
 valued, the defendants, by distraining the whole twenty-
 five acres, together with the other goods taken, were
 guilty of an excessive distress, and, for the same
 reason, were not justified in seizing the beasts of the
 plough, on making the second distress. For the de-
 fendants, it was insisted that the growing crops were not
 subject of valuation at the time they were distrained,
 and consequently that the defendants were justified
 in taking both distresses. The learned judge left it
 to the jury to say whether, upon the evidence, they
 could put any value on the growing crops taken under
 the first distress at the time they were distrained, (25th
 March,) and if so, whether such value, with the other
 goods taken, made the distress excessive. The jury
 (chiefly farmers, who had intimated during the trial that
 it was easy to put a value on crops in the spring,) found
 the value of the growing crops taken under the first dis-
 tress to be 190*l.*, and returned a verdict for the plain-
 tiff on the first, second, and sixth counts, with 100*l.*
 damages for the excessive distress, 3*l.* 10*s.* for dis-
 training the beasts of the plough, and 100*l.* for the
 double value of the goods mentioned in the sixth count.
 The issues on the other counts were found for the
 defendants. The learned judge having given the
 defendants leave to move to enter a verdict for the
 defendants on the counts found for the plaintiff, if the
 court should think the growing crops should not have
 been taken into consideration, *Ludlow Serjt.* in last
Michaelmas term obtained a rule accordingly; against
 which cause was shown in *Hilary* term by

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of *Talford Serjt.* and *Whateley*. The argument on
 the other side must go to the extent of saying, that

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growing crops are not to be taken into consideration at all at the time of making a distress, and that the whole of them may be distrained, although the other goods on the premises would raise the amount of the rent within the smallest possible sum. With respect to the verdict on the sixth count, it may perhaps be admitted that it cannot be supported. It is different however as regards the first count, on which a material question was raised upon the record. By their plea to that count, the defendants took issue on the point, whether the growing crops, with the other goods, were of greater value than the distress. That was an issue of fact, and it is not open to them now to contend that the growing crops ought not to have entered into the consideration of the jury, to whom the issue was expressly submitted. If the growing crops were improperly introduced into the declaration, the defendants should have demurred. [*Parke B.* The issue on the first count is, whether the growing crops and other goods together were of greater value than the distress.] If it is meant to be said on the other side, that growing crops are not susceptible of being valued, that question was put by the judge to the jury, and answered in the affirmative. They are frequently the subjects of sale; they may be seized and disposed of under a *fiери facias*; consequently there is no pretence for saying they cannot be valued. The difficulty arises from confounding value with appraisement. It was not until the 2 *W. & M.* sess. 2. c. 5. that goods seized for rent could be sold, and consequently, previous to that act, no question as to appraisement could be raised. But the action for an excessive distress, which turns upon the value of the goods, was given long before by the statute of *Marlbridge*, 52 *Hen. 3.* c. 4. An appraisement in truth furnishes no guide as to the amount of a distress. The want of it may be a ground

complaint, for which nominal damages may be recovered; but it is not evidence for the defendant in an action for an excessive distress, who must call the appraisers by whom it was made. If growing crops are not to be reckoned in estimating the amount of a distress, the landlord should not take them; if he does, he ought not to be allowed to turn round and say that they are of no present value. Again, how is a replevin to be effected under the 11 *Geo. 2. c. 19. s. 23.* if growing crops are not to be estimated? By that statute the sheriff is bound to take a replevin bond in double the value of the goods distrained, including as well the growing crops as the other goods seized. So that it is clear that where the former are replevied, some value must be put upon them. Moreover, a tenant cannot replevy part of the goods seized, but must find sureties in double the value of the whole; and in the event of his not doing so, the sheriff will remain in possession at his expense until the crops are cut. Consequently he may be put to very great inconvenience and cost in procuring sureties, or may be prevented from replevying at all by the taking of his growing crops; and yet, according to the argument on the other side, they may be seized for an arrear of 5*l.* although they may be worth 1000*l.* Under the last-mentioned statute growing crops may clearly be appraised for one purpose, and if so, they may for another. The question is the same on the second count with respect to tithing beasts of the plough. If growing crops are not to be reckoned, and the other goods on the farm will not satisfy the distress, then undoubtedly beasts of the plough may be distrained. But is it reasonable that the cart should be seized, and the work of the farm stopped, although there are growing crops of sufficient value which may be taken? Or is a landlord to be permitted to seize the crops, and then, saying they are

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of no value, to take the beasts of the plough. That would be a proceeding inconsistent with justice, and one which the law will hardly sanction.

Ludlow Serjt. and *Busby* in support of the rule. It is admitted that the sixth count, for distraining when no rent was due, cannot be supported, and that admission will, it is apprehended, also dispose of the second count, for taking beasts of the plough. The case is then reduced to the question on the first count, whether this was an excessive distress? and, it is submitted, it was not. Where a man takes several articles of clear ascertainable value, or a large chattel for a small sum, it is manifest he has some intention beyond the satisfaction of the rent. But he may distrain a cart and horses for a small matter, because they are not severable; *Clark v. Tucker* (a). The present case is somewhat similar, for the subject-matter seized is of imaginary value, inasmuch as no certain estimate can be put upon growing crops. Between an outgoing and incoming tenant a conventional value is sometimes placed upon them, but that is only for the sake of mutual convenience. If the present action is allowed, a tenant may recover a verdict against his landlord for taking crops, which he is not permitted to reduce into money until they are ripe, and the week after the assizes a storm may destroy the crops, without leaving sufficient to satisfy the rent. [*Parke* B. The same thing might have happened under a distress at common law. A man might have taken a flock of sheep for a small arrear, and they might have died in the pound, so that he might have been placed in the situation of having a verdict against him for an excessive distress, and yet not have had his rent satisfied.] In order to maintain the present action two things are requisite;

(a) 2 Vent. 183.

there must be a wrongful act, and there must be some damage resulting from that act. Conceding that it is a wrongful act to take the growing crops, how is the tenant damaged by the landlord saying he will not part with them until he is paid his rent? It is said the tenant could not replevy, from being required to find sureties in so large an amount; but in *Owen v. Legh* (a) it was held, that the tenant had no occasion to replevy, as the landlord cannot sell the crops till they are ripe. Moreover, the 23d section of the 11 G. 2. c. 19., relating to replevins, does not extend to growing crops, but only to goods and chattels; *Miller v. Green* (b). [R. B. Your argument is, that although the statute, and speaks of taking them as a distress, yet its effect is only to give the landlord a lien upon the crops.] The landlord is obliged to seize them, otherwise they might be taken in execution under a *fieri facias*. It is said that the being seizable in execution shows they are of some value. The sheriff, however, may take a lease, but *non* *levast* it produces any thing. [Alderson B. What damage is it said the tenant has sustained? Is it in not being able to sell the crops?] He may still sell them, for he may redeem them at any time by tendering the arrears of rent due. With regard to the supposed admission on the record, it is contended that the plea, by taking issue on the fact whether the goods, chattels, and growing crops were of greater value than the rent due, thereby admits that the latter are of some value. But the language of the plea, which follows the words of the declaration, is perfectly consistent with the defendants now saying that the growing crops are of no appreciable value; for when they allege that the whole are not of more value than will cover the rent, it is the same as saying the goods are only just of sufficient value, and the crops are of

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(a) 3 B. & A. 470.

(b) 2 Tyr. 1.

defendants for an excessive distress.

The judgment of the court was determined by

PARKE, B.—Two questions remained in this case which were discussed in the cause against a rule to enter a verdict for the plaintiff on the first, second, and sixth count of the declaration, upon a point reserved by my brother. First, whether a landlord be liable in trespass for an action on the case for an excessive distress, if the excess consists wholly in growing crops, the produce of which is capable of being taken at the time of seizure;—and secondly, whether in a similar action for seizing beasts of the plaintiff's distress for rent, there having been at the time sufficient distress on the land demised, if the trespassers are to be included for this purpose. The two questions in the cause were disposed of, either on the first or second argument; these were reserved for the third, on account of their novelty and importance.

The two questions differ from each other in that the court have had much more difficulty in the first, than the second, and we have

an action is not maintainable for distraining beasts of the plough, under the circumstances of this case.

The common law right of a landlord to distrain for rent service, appears to be restricted *at common law*, to the taking of a *reasonable* distress. So Lord Coke intimates in his reading on the statute of *Marlbridge*, ch. 4, 2 *Inst.* 107; which statute he there says "agreeth with the reason of the common law." But, whether the duty to make a reasonable distress be created by the common law, or by the statute, an action will equally lie, if there be a breach of that duty, and damage thereby arise to the person on whose goods the distress is made. At common law, and when the statute of *Marlbridge* passed, a distress could be made only upon moveable chattels, being upon the land demised, and such as were capable, after they had been detained for an unlimited time as a pledge, of being restored in the same plight and condition to the distrainee; and the damage which was sustained by the latter, by an excessive distress, was the loss of the use and enjoyment of the surplus of such goods, which were removed and impounded off his land for such time as he was deprived of it; and if not restored before action brought, then probably he might claim the full value of such surplus. When the common law right of the landlord was extended to other chattels of the like description, that is, capable of being removed and impounded off the premises, cattle or stock, for instance, upon commons appendant or appurtenant to the demised lands, the inconvenience to the distrainee being precisely of the same nature, doubtless he would be entitled to the same remedy. But the statute law has created some new distrainable subjects, which are not to be treated in the same way as those which are distrainable at common law; one class of which, though of a moveable nature, is not allowed to

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be removed at all; and another is of an immoveable quality at the time of the distress, and both of which are ultimately to be disposed of in a way entirely different from that prescribed by the common law. One of those subjects is, corn loose, or in the straw, or in sheaves, or cocks, or hay, which by the statute 2, H. & M. sess. 1, c. 5, s. 3, may be secured, locked up and detained in the place *where found*, in the nature of a distress, until replevied, and in default of replevying, *must*, it should seem, be *sold* in five days, and cannot be removed, and this species of subject of distress differs from that at common law, in respect of its being legally, both incapable of removal, and of being kept for an indefinite period, till payment of the rent. Another of these subjects is growing corn, or other product, which by 11 Geo. 2, c. 19, may be distrained, but cannot be disposed of, until after it has become ripe, and been cut; which must afterwards be placed in barns or other place on the demised premises, and cannot be then removed from the premises, except *sub modo*, that is, in default of there being such a proper place; and this new subject *must*, as it seems, be then *sold*; so that it differs entirely from the common law subjects of distress.

The question then arises, whether both or either of these new distrainable subjects be within the principle of the common law, or the statute of *Marlbridge*, so that the distrainer is to be liable, if he takes an unreasonable quantity of such subjects, either alone, or jointly with other chattels. And we think that they are. The duty of taking a reasonable quantity, which the law casts on the distrainer, cannot be varied by this extension of his powers; if he takes more, he exceeds his duty; and if damage is caused thereby to the distrainee, it seems to be inconsistent to say, that he shall not have a remedy, because from the change in the mode

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of treating the subject of distress, the nature of the damage is changed. If there be a breach of duty, and damage thereby, the case falls within the established principle, though the quantum of compensation will of course vary if the damage be less.

Does the distrainee then sustain damage by the act of the distrainor in taking too large a quantity either of corn or hay loose, or growing crops? It seems to us that he does in both cases. In the former he is deprived of the power, for a limited time, of making use of the corn or hay for his cattle, or disposing of it freely at the market; or he is exposed to the inconvenience of procuring sureties in a replevin bond to a larger amount, if he chooses to replevy, and to regain the full dominion over his property; and it may be that an additional expense for securing the distress is cast upon him by this unnecessary addition to the chattels distrained; for he must ultimately pay whatever reasonable expense is incurred by the landlord. In the latter case, that of a distress of growing crops, he is deprived of the power of selling and receiving the money to his own use, with respect to all the surplus which the landlord has unreasonably taken. He cannot feed off or cut his crops while green, for fodder or sale; he must also be exposed to additional expense, in the keeping the distress; for the statute 11 Geo. 2. c. 19. s. 19. provides that if the tenant pay to the landlord *before* the crops are ripe, cut, and gathered, all the rent, costs, and charges of making the distress, and which shall have been occasioned thereby, the distress shall cease. It is therefore clear, that the law contemplates, that in a distress of a growing crop some other expense will be occasioned to the landlord than that of making the distress; such would be the cost, if the tender was made at a late period, of preparing for, or beginning harvest, which might be greater to the landlord than the tenant;

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and the cost of looking after the crops to prevent their being damaged by trespassers, or improperly abstracted by the tenant, which would be incurred from the earliest time.

"These expenses the tenant would ultimately have to pay; and he could not be relieved from the accruing liability to pay them, or restored to the full dominion over his growing crops, without the inconvenience of replevying, and being bound, if he replevies, to give security to double the full value, being a greater amount than he would have done, if a proper distress had been taken. These are inconveniences to a tenant, from taking too large a distress, though they vary much in degree; and in most cases would be almost nominal; but if there be any damage, the action, we think, will lie. One mode of illustrating the principle, is by putting an extreme case as suggested at the bar. Suppose for an arrear of 5l. the growing crops on a thousand acres of land were distrained in March, and the tenant thereby prevented from dealing with the crops, by selling them on his own account, or cutting down, or feeding them off by cattle, if he chose, from thence to the following harvest time. It could not be said that the quantity taken was not greater than it ought to have been, or that the tenant had sustained no damage. The principle is the same as the present, and the inconvenience differs only in degree.

"For these reasons we think that the plaintiff was entitled to a verdict on the first count, — but not for the full value of the crops beyond the amount which ought to have been taken; upon which principle the jury appear to have given their verdict. The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take, during the time of possession; and some

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compensation for the loss of the absolute ownership and power of disposition for the same time; or if the tenant has been levied, then a compensation for the additional expense and inconvenience of replevying to a larger amount. It cannot be contended, that the probable value of the crops is to be taken as a present satisfaction of the rent to that amount; so as to make the landlord a wrong-doer by taking and selling all (or as the case may be) the excess of moveable chattels, and liable for their values; for he has a right to apply those which are immediately productive in satisfaction of the rent, *pro tanto*, and hold a reasonable part of the present unproductive fund, as a security for the balance. We therefore think that the jury have given excessive damages, and unless by mutual agreement they can be reduced to a sum nearly nominal, there ought to be a new trial.

The second question is, whether the landlord can be liable to an action on the case for taking and selling the beasts of the plough, when there was another sufficient distress on the land, demised; but such sufficient distress included growing crops, and without those crops there was no sufficient distress. We are clearly of opinion that he is not liable in this case; for the landlord has a right to resort to the subjects of distress, which are immediately available to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period. If there are other moveable chattels, to the amount of rent and expenses besides *averia carucae*, he would not be justifiable in taking the latter; but if there are not, he has a right to take and sell all, or so many of the beasts of the plough as may be necessary, with the other moveable and saleable chattels, to satisfy the arrears and charges.

We therefore think that the verdict on the second

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count should be entered for the defendant, and it is conceded by the plaintiff that on the sixth count the defendant is entitled to a verdict. Rule accordingly. *Duckworth against Allison.*

By articles of agreement made between the plaintiff and the defendant, for altering and repairing a warehouse of the latter, it was stipulated that in the event of the work not being completed in three months, the plaintiff should forfeit and pay to the defendant the sum of 5*l.* weekly and every week he should be engaged in such work beyond the said period, such penalty to be deducted from the amount which might remain owing to the plaintiff on the completion of the work.

ASSUMPSIT for goods sold and delivered, and work and labour. Pleas:—first, non assumpsit, except as to 52*l.* 16*s.* 5*d.* and 55*l.* parcel &c. Secondly, as to 52*l.* 16*s.* 5*d.* payment. Thirdly, as to 55*l.* parcel &c., that by certain articles of agreement between the plaintiff of the one part, and the defendant and Archibald Mansfield of the other part, it was recited, that the defendant was the owner of a warehouse and premises in Liverpool, and that he had contracted and agreed with the plaintiff for the altering and repairing of the said warehouse for the sum of 815*l.* 19*s.* in the manner and upon the terms in the said articles after expressed and referred to, upon the express condition that the plaintiff should find and procure good and sufficient surety for the due and faithful performance of the said contract, and that the said A. M. had agreed to join in and execute the said articles as the surety of the plaintiff, in the manner thereafter expressed; and in and by the said articles, the plaintiff and the said A. M. did, for themselves jointly as well as severally, and for their joint and several heirs, executors and administrators, covenant, promise, stipulate

Held, in an action brought for extra work done to the same premises; that the defendant, who had paid the whole of the contract price, was entitled to set off the penalty against such extra work, the agreement giving him a two-fold remedy, either to deduct it from the contract price, or to recover it as a payment due to him.

and agree, to and with the defendant, his executors and administrators, that the plaintiff should and would, on the day of the date of the said articles, proceed to alter, repair, and build the aforesaid warehouse, conformable to a certain plan to the said articles annexed, and under the direction of J. B. of Liverpool, architect and surveyor, in every branch and department of business, as might be requisite for the carrying on and completing the work, according to the stipulations in the said articles in that behalf mentioned, in a substantial and workmanlike manner, in three months from the date of the said articles; and in the event of the said work not being fully and effectually completed in the aforesaid period, to the satisfaction and approval of the said J. B., he the plaintiff should forfeit and pay to the said defendant the sum of 5*l.* weekly and every week he should be engaged in such work beyond the said period of three months, such penalty and forfeiture to be deducted from the amount which might remain owing from the defendant to the plaintiff on the satisfactory completion of the aforesaid work; in consideration whereof, and of the aforesaid covenants, conditions, and agreements being fully complied with, the defendant did by the said articles covenant, promise, and agree to and with the plaintiff, his executors, and administrators, in manner following; that is to say, that he the defendant should and would pay, or cause to be paid, at the times and in manner in the said articles therein specified, making together the total sum of 5*l.* 19*s.*, as by the said articles, reference being thereunto had, would appear. The plea then alleged, that though the plaintiff duly proceeded to alter, repair, and build the said warehouse, under the directions of the said J. B., in pursuance of the said articles,

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yet the plaintiff did not do, execute, and perform, all and singular the covenants and stipulations in the said articles in that behalf mentioned, in a substantial and workmanlike manner, in three months from the date of the said articles; but that, on the contrary thereof, the same work was not fully and effectually completed in the aforesaid period, to the satisfaction of the said J. B. nor until the lapse of, to wit, eleven whole weeks after the end of and beyond the said period, during the whole of which the said work was incomplete, and the plaintiff was, during each of the said eleven weeks beyond the said period, engaged in the said work, whereby and by force of the said articles, the plaintiff became liable to pay to the defendant the sum of 55*l.*, being after the rate of 5*l.* weekly, and for each of the said eleven weeks beyond the period during which the plaintiff was so engaged in the said work as aforesaid. And the defendant saith, that he did, before the commencement of this suit, at the times and in manner in the said articles mentioned and provided for, pay to the plaintiff the total sum of 815*l.* 4*9s.*, for and in respect of the said work in the said articles mentioned, without deducting or retaining therefrom the said sum of 55*l.* or any part thereof; that the said sum of 55*l.* and every part thereof, was, at the commencement of this suit, and still is, due from the plaintiff to the defendant, by virtue of the said articles; and which said sum equals and exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said several promises in the declaration mentioned, so far as the same relate to the said sum of 55*l.* parcel &c. The plea in conclusion offered to set off that sum. The plaintiff replied, that the defendant did not pay the 815*l.* 19*s.*, and that he the plaintiff did not owe the said sum of 55*l.*

the trial before Parke B. at the last Liverpool assizes, the jury found a verdict for the defendant. The court then moved to enter up judgment for the plaintiff on the third issue, *non obstante veredicto*. This admits something to be due, independent of the original contract. [Parke B. It admits 55*l*. to be due.] The contract provides, that the penalty to be paid by the plaintiff, shall be deducted out of the 55*l*. the contract price, and unless the defendant sets it off out of that sum, he is not entitled to set it against the extra work; for a specific mode of setting it off is pointed out, and the law does not admit of other. [Parke B. The plea states, that the plaintiff forsook and pay to the defendant 5*l*. weekly. On the face of the plea there is, therefore, a covenant to pay money. If the contract had contained only a covenant to deduct, there would be great force in the objection.] The last clause directing the penalty to be deducted takes the rest of the sentence. [Alderson B. That is a further advantage to the defendant.]

Parke B.—We all think that the power of deducting the penalty from the contract price is an additional right given to the defendant. There is, first of all, a right to pay the penalty, and to restrain such payment; the subsequent words should have been much stronger than those used here. The defendant had a full remedy, either to deduct the penalty from the contract price, or to set it off as a payment.

Rule refused.

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DUCKWORTH

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A horse of the plaintiff having been killed by falling down an old shaft of a mine which had been covered over for a number of years, he charged the defendant with being in possession of the shaft, as belonging to a mine of his called the *Ox Close Mine*. The defendant denied that the shaft belonged to him, but added, that if a miners' jury were called and said it was his, he would pay for the horse.

A miners' jury being called they found in writing that the shaft was the defendant's.

Held, in an action on the case to recover compensation for the horse, that such finding

of the jury, coupled with the defendant's declaration, was admissible in evidence against him to prove he was in possession of the shaft.

Held also, that as the document did not appear on the face of it to be an award, it did not require an award stamp.

behind of the defendant's declaration was admissible in evidence against him to prove he was in possession of the shaft.

SYBRAN against WHITE.

CASE. The declaration stated, that the plaintiff was possessed of a certain close called the *Bean Croft*, in the county of *Derby*, and of a mare which was depasturing in the said close; and that the defendant was possessed of a certain lead mine called the *Ox Close Mine*, and of a shaft in the said close leading and belonging to the said mine; by reason whereof the defendant ought to have kept the said shaft well and securely fenced round, to prevent cattle depasturing in the said close from falling into the said shaft: yet that the defendant, not regarding &c. suffered and permitted the said shaft to be and remain open, whereby the said mare of the plaintiff fell down the same and was killed. Pleas: first, that the defendant was not possessed of the said mine; secondly, that he was not bound to keep the shaft fenced round. Issue was joined on the pleas.

At the trial before *Gaselee J.* at the last *Derbyshire* summer assizes, the following facts appeared in evidence. The close mentioned in the declaration, which was in the possession of the plaintiff, contained a shaft that had been covered over for the greater part of a century. One day, while the plaintiff's mare was grazing upon the surface covering it, it gave way, and she was precipitated down the shaft and was killed. The plaintiff and the defendant had a meeting soon after the accident, at which the plaintiff contended that the shaft belonged to a mine called the *Ox Close Mine*, which had been in the possession of the defend-

nt. This was denied by the defendant, but he added, that if a miners' jury were called, and they said the shaft was his, he would pay for the mare.

The close in question is situate within the wapentake of *Worksworth*, in which there is a court, called the *barmote court*, held before the *barmaster* and a jury. The latter consists nominally of 24 miners belonging to the district, but the practice is to summon a much smaller number. The great *barmote courts* are held twice a year, but a court may be called at any time when required. In the present case, the *barmaster*, on the application of the plaintiff, summoned a jury consisting of five persons, who examined the premises, and gave their determination a verdict in writing, that the shaft in question belonged to the defendant. The following is a copy of the proceedings:

"Gentlemen of the Jury,
"You are requested to look over certain lands in the township of *W. & S.*, called *Or Close and Bean Croft*, and to examine the range of the mines, shafts, veins, and meers of ground given away by the *barmaster* for mineral uses. Copies from the *barmaster's books* will be laid before you, and such other information as is required, from which you are requested to declare in writing who are the owners of the aforesaid shafts, veins, &c.; and may the God of all wisdom direct you right."
"Joseph Sybray."

"We whose names are hereunder written, being five of the grand jury of twenty-four, and being this day summoned to a certain mile called *Or Close and Bean Croft*, lying and being in the liberty of *Metlock* and wapentake aforesaid, and there having received a bill from *J. Sybray, &c.*

In answer to the said bill, we have examined the range of the mines, shafts, veins, and meers of ground, as given away March 15, 1822, and September 23, 1834, by *Francis Hursthouse*, *barmaster* to *Benjamin White*, and consolidated together as one title, according to the copies produced from the *barmaster's book*, *Michael Carding*, 24 man. *Anthony Knowles* says that he remembers houses standing

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To certify that the above is a true and correct copy of the proceedings in the *barmote court*, held before the *barmaster* and a jury, on the application of the plaintiff, summoned a jury consisting of five persons, who examined the premises, and gave their determination a verdict in writing, that the shaft in question belonged to the defendant. The following is a copy of the proceedings:

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upon a hillock in a bush in the *Bean Croft* marked with O. C. and L. standing for *Ox Close* and *Lee Wood*. Mr. *Stilner* says, that right and title was given away by the *Bartolmees* and Mr. *G. Tasington* says, that the first and second gift was consolidated together as one title. Mr. *J. H. Harrison* says, that the gift was consolidated together by the last evidence; and it is our opinion that the mine, shaft, veins, and means of ground lying and being in the *Ox Close* and *Bean Croft* belong to *Benjamin White* and partners. As witness our hands,

" William Walker.

" John Taylor.

" Robert Shaw.

" James Marshall.

" *Godfrey Taylor*. /

The latter document was tendered in evidence by the plaintiff, but was objected to as being either an award, and consequently requiring a stamp, or else a verdict of a court, in which latter case the proceedings were not properly proved. The learned judge, however, admitted the document. On the part of the defendant, to negative that the shaft was in his possession, evidence was given that he had parted with his interest in the *Ox Close Mine* several years before; evidence was also adduced to prove that the shaft did not belong to the *Ox Close Mine*, which was two fields distant. It likewise appeared, that although the defendant at first said he supposed he had nothing to do but to pay, he afterwards, being dissatisfied with the determination of the jury, refused to abide by it, and summoned another jury, which the plaintiff declined to attend. The result of the second inquiry was in favour of the defendant, the documents relating to which were similar to those already given.

The learned judge left it to the jury to say whether the defendant had not agreed to be bound by the finding of the first jury; adding, that he thought the defendant was concluded by such finding. He also desired them to say whether the shaft was in the

nt's possession or not. The jury returned a
for the plaintiff, damages 15*l.*, saying that they
the shaft was in the defendant's possession.

Michaelmas term, *Goulburn* Serjt. obtained a
for a new trial, on the ground that the finding
miners' jury was not admissible in evidence;
n if it was, that such finding was not conclusive,
been stated by the learned judge, against the
nt.

ay Serjt. and *N. R. Clarke* now showed cause.
d that there was no evidence of the defendant's
on of the shaft, except the finding of the
jury, and that such finding was improperly
in evidence, as it is an award, and ought to
ad an award stamp. It is submitted that it is
ward. A dispute arising between the parties,
eft to the jury to say whether the shaft be-
p the defendant, and they found it did. Upon
xamination of the jury the defendant said, he
d he had nothing to do but to pay. The find-
he jury was therefore used, coupled with the
nt's statement, and amounted to an admission
of his liability. [*Parke* B. It is a question
what the defendant said may not be treated
reement on his part, that if the jury say that
his is his, that it shall be so. Immediately after
ing he seems to have acquiesced. The case
el. v. Pitt (a) comes very near to this. It was
eld, that a party having referred to the evi-
f another, he was bound by what that person
Williams v. Innes (b) is also in point. Here
ge does not appear to have treated the finding
miners' jury as conclusive, for he admitted
to show that the defendant had parted with
rest in the mine. *Gurney* B. And he also

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admitted the finding of the second jury.] Evidence was given on both sides, and the question was left to the jury, and it is submitted that there is sufficient evidence to support the verdict, which the jury found for the plaintiff.

Gulburn Serjt. and M. D. Hill contra. The cases cited were in assumpsit, and consequently are distinguishable from the present, which is in tort. The question is, whether in an action on the case it can be said that the defendant, under the circumstances, was in possession, particularly when it was proved he had parted with his interest several years before. [Parke B. That the jury seem to have disbelieved.] The finding of the miners' jury was not admissible in evidence. Suppose it trespass the issue was, whether A. was in possession of a certain close, and it was proved A. had said, "If C. and D. find him, I will pay," would that be evidence of A.'s possession? [Parke B. To obviate any objection, the judge left the question to the jury, whether the fact was the same as was found by the miners' jury. The only question is, whether there was evidence to justify that leaving. Alderson B. A verdict of a jury that the defendant was in possession would be evidence between the parties of the fact. If that is so in an adverse suit, where is the distinction when the fact is found in a voluntary suit?] In the one case the verdict is in a suit recognized by law, and in the other it is only the determination of a few individuals. [Parke B. An award between the same parties would be evidence, and the question is, whether this is not in the nature of an award, and evidence that the shaft was in the defendant's possession. In *Daniel v. Pitt* it was held, that a party, by a reference to what a third person says, appoints the latter his agent to make an admission. Here it may be said that this is either an award, or that the defendant has

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appointed the jury his agents to determine [the point] if this is an award, then the objection as to the stamp prevails. If it is an agreement by the defendant to pay the damage in case the jury find he is in possession of the shaft, it should have been declared on as such. But even supposing it to be binding, it is not relevant to the issue, which is not whether there was an agreement by the defendant to pay the damage, but whether the shaft was in the defendant's possession. More than in the cases cited, the persons to whom the matters were referred had a particular knowledge of the subject; but here the jury had no previous knowledge of the fact to be determined. [Parke B.] When a person has a particular knowledge of not is of no consequence if the party chooses to assume he has, and refers the matter to him. *Alderson B. Prince v. Hollis (a)* is the nearest case to the present. But it does not appear whether in that case the doubtless opinion was stamped for the objection does not seem to have been taken. Every thing in the nature of an award must have the incidents of an award. Here the other side seek to use the verdict as an award or parol submission, and it ought to be stamped accordingly. The cases cited if not determined on the ground of the matter being referred to a party having a peculiar knowledge on the subject, are bad law; for otherwise his judgment would amount to an award. [Bolland B.] Those cases have struck me as standing on the ground that the parties had made the persons referred to witnesses. In *Burt v. Ralmer (b)*, Lord Ellenborough stated the rule to be, "that where a person is referred to, to settle or adjust any account or business, what he says, if it is connected with the business which is referred to him, is evidence." These decisions go upon the doctrine of principal and agent;

(a) 1 M. & S. 1051

(b) 5 Esp. 145.

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but a person put in the situation of a judge, either by law or by the consent of the parties, cannot be considered as an agent. The law treats an arbitrator as a judge, giving him many of the same protections, and never considers him as an agent. Again, supposing the finding of the miners' jury to be admissible and relevant, it does not prove the issue. Even if the jury were correct in thinking that the shaft was wrought with the mine, that would not establish such a possession in the defendant as to cast the burden upon him of paying for the plaintiff's mare. It was shown that the shaft was not included in the gift of mines and shafts made to the defendant, for no one then knew of its existence.

PARKE B.—I am of opinion that this rule ought to be discharged. If the verdict had been for a larger sum, I should have concurred in granting a new trial, for I think that the defendant has been made to pay for a loss for which he was not responsible, as, in my opinion, he was not in possession of the shaft. We cannot however grant a new trial consistently with the rule of this court, the verdict being under 20l. From the report of the learned judge, there has been no improper reception of evidence, and no misdirection which has produced a wrong verdict, taking the whole of the charge together. Two objections have been made to the admissibility of the verdict of the miners' jury in evidence. The first is, that it is not evidence to prove the defendant was in possession of the shaft. I am of opinion that, coupled with what the defendant said, it was evidence of that fact. Suppose the defendant, acting alone, had said, "if the jury find that the shaft is mine I will pay the damage;" then, on the principle of *Daniel v. Pitt*, he would have made them his agents to admit that fact: for his so saying is equivalent to

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"if they say it is mine, I say it is mine." Here, the declaration of the defendant, there is the assent of the plaintiff, both parties agreeing to the decision of the jury. But secondly, this verdict is in the nature of an award, and is to be stamped. The stamp act however only stamps where the paper on the face of it purports to be an award. If two persons agree to refer a cause to a counsel, and to be bound by his opinion, if the opinion does not contain evidence of the agreement, do not think it would require a stamp. So a verdict, which does not appear on the face of it to be a settlement of the dispute between the parties, is not to be stamped. With regard to the charge of the learned judge, he seems to have left the question to the jury, whether the defendant had agreed to be bound by the finding of the miners' jury. In that direction was wrong, for the whole question was open for the jury, and neither party was bound by such finding. But the learned judge, after that he thought the defendant was bound, asked the jury to tell him, as a distinct question, whether the defendant was in possession of the shaft. With regard to that, evidence was given on both sides. There was, for the plaintiff, although the great body of the evidence was with the defendant, for no one could see that the evidence on his part greatly preponderated; but as the question was left to the jury, and the whole of the evidence, we cannot, for the reasons before given, grant a new trial.

AND B.—I am of the same opinion, and I am of the view of the case taken by my brother. It is to be lamented that, the verdict being for a small amount, we are prevented from granting a new trial.

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ALDERSON B.—I am of the same opinion. I regret we cannot grant a new trial, for I feel the verdict to be wrong.

Rule discharged.

GRAHAM *against* PARTRIDGE.

Since the rules of *Hilary* term 4 W. 4. a defendant is not entitled to give evidence of a set-off, under a notice of set-off delivered with the plea *nunquam indebitus*, for the proviso in the 3 & 4 W. 4. c. 42. s. 1. restraining the judges from depriving parties of the power of pleading the general issue, and giving the special matter in evidence, does not apply to the case of a set-off, so as to prevent the judges from requiring by the new rules that a set-off shall in all cases be pleaded.

DEBT for goods sold, with the money counts. Plea, that defendant never was indebted, according to the form given in *Reg. Gen. Hil. 4 W. 4.* with notice of set-off. At the trial before Lord *Abinger* at the last *Warwickshire* assizes, the defendant tendered evidence of a cross-demand under the notice of set-off. It was objected, that since the recent rules of pleading, a set-off could not be given in evidence under the general issue, but must be specially pleaded. His lordship being of that opinion, rejected the evidence, and the jury found a verdict for the plaintiff.

Humfrey, early in this term, moved for a new trial, on the ground that the evidence was improperly rejected. He admitted that it was required by *Nov. 3.* of the new rules of pleading in *Assumpsit* and *Debt*, that a set-off should be pleaded specially; but he contended that the judges had no power to alter the mode of pleading, with regard to that defence; for by the proviso in the 3 & 4 W. 4. c. 42. s. 1. it is enacted, "that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case where he is now, or hereafter shall be, entitled to do so, by virtue of any act of parliament now or hereafter to be in force." By the 2 *Geo. 2.* c. 22. s. 13. a defendant is entitled to give a set-off in evidence under the general issue. This case, therefore, falls within

the proviso; and the evidence ought to have been received notwithstanding the new rules. A rule nisi having been granted,

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Goulburn Serjt. and *Haycs* showed cause. It is conceded by the other side that, according to the terms of the new rules of pleading, a set-off should be specially pleaded. Indeed no question could be raised on the point, for this defence is expressly mentioned as an example of the defences in confession and avoidance, which must be pleaded, in the rule relative to *Assumpsit*, No. 3. And by the subsequent rules relative to pleadings in debt, it is declared, that the plea that the defendant never was indebted, "shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit." And in *Fidgett v. Penny* (a), Mr. Baron *Alderson* says, "that since the new rules a set-off cannot be given in evidence under the general issue." It is, however, contended, that by reason of the proviso in 3 & 4 Will. 4. c. 42. s. 1. the judges had no power to alter the mode of pleading in regard to the defence of set-off. But that proviso does not apply to the case of a set-off. With respect to the intention of this enactment, there can be no doubt that its object was to apply to the cases of those classes of persons who were entitled by various statutes to peculiar privileges with regard to pleading, such as magistrates, constables, revenue officers, persons acting under particular acts of parliament, and the like. Persons so situated are liable to be harassed in the discharge of their duty by a multitude of vexatious actions; and the legislature has on this account from time to time afforded them facilities in de-

(a) 4 Tyr. R. 651.

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feeding themselves, by permitting them to give in evidence, under the general issue, matters which ordinary defendants are bound to plead specially. It was not intended to take away their privileges by the 2 & 4 Wm. 4. c. 42, and the proviso was evidently framed for this purpose. But the defence of set-off does not fall within the reason of these cases, for it is a defence common to all persons, and it is impossible to suggest a ground why the legislature should regard a set-off with greater favour than any other defence in confession and avoidance. This defence was not, therefore, within the intention of the proviso, nor will it be found to be within the words of the proviso, when they are properly examined. The words are, "that no such rule shall have the effect of depriving any person of the power of pleading the general issue and giving the special matter in evidence, in any case where he is now or hereafter shall be entitled to do so, by virtue of any act of parliament now or hereafter to be made." It is plain that this language is applicable to those cases only in which a defendant was empowered by some statute to give in evidence, under the 'general issue, matters which, according to the ordinary rules of pleading, he ought to have pleaded specially. By the words "*the special matter*," the legislature must have intended matter which, in ordinary cases, required a special plea. The operation of the proviso must, therefore, be confined to those cases in which a relaxation of the ordinary rules of pleading is permitted by some statute. But the statute of set-off is not an act of this description: it introduced a new species of defence, but its operation upon the rules of pleading was rather restrictive than enabling. Before the statute 2 Geo. 2. c. 22. s. 18. a cross-demand could be enforced only by means of a cross-action. By that statute it is enacted, that where there are mutual debts, "one debt may be

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against the other; it does not however say, that defendant shall be entitled to give a cross-demandence under the general issue in all cases, but only that such matter may be given in evidence under the general issue, or pleaded specially, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, creditor or intestate, is intended to be insisted on in defence, notice shall be given, &c." The words, "as the nature of the case shall require," must have been intended to refer to the forms of pleading then in vogue; and the meaning of the legislature was, in cases where the general issue was of so comprehensive a nature as to entitle the defendant to give evidence under it matters which were in confession and avoidance of the plaintiff's original demand, a defendant should be allowed to avail himself, under this of the new defence in confession and avoidance by the statute of set-off, provided he gave notice of the nature of his set-off to the plaintiff; but that in cases where the general issue was inapplicable to defence in confession and avoidance, there should be a special plea. It is well known that formerly, in debt on simple contract the plea of *nil debet*, and in assumpsit the plea of *non assumpsit*, admitted of the setting off of any defence by way of confession and avoidance, which showed that the plaintiff's demand was not due; for in the first case the plea put in issue the non-existence of legal debt and liability; and in the second it put in issue the implied assumpsit which resulted from the existing liability. And as the statute of set-off entitled a defendant to apply a cross-demand in liquidation and discharge of the plaintiff's demands, this would have been a good defence under *nil debet* or *non assumpsit*, if the statute had been silent as to the forms of pleading. But in debt on specialty or cove-

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nant, the general issue of *non est factum* was of a much less comprehensive description, and was from its nature and language quite inapplicable to the defence of set-off, or any other defence by way of confession and avoidance. Here, therefore, according to the terms of the statute the nature of the case would require a special plea, and accordingly, in *Oldershaw v. Thompson* (a), it was decided that a set-off could not be proved under *non est factum*. These were the only forms of action in which the question of a set-off could arise, and therefore it cannot be said that the statute of set-off effected any alteration in the forms of pleading as they previously existed, except by requiring a notice to be given with the pleas of *nil debet* and *non assumpsit*, which was a restriction and not a relaxation. And if this view of the statute of set-off be correct, the defence does not fall within the language of the proviso of 3 & 4 W. 4. c. 42. s. 1.

Secondly, even if that proviso did comprehend the case of a set-off, the defendant cannot avail himself of such a defence under the form of this record. For he has adopted the form of plea given by the new rules, viz. that he never was indebted to the plaintiff. And this form of plea is quite inconsistent with the defence of a set-off. The language of *Bayley J.* in *Oldershaw v. Thompson*, shows that a set-off is not admissible under a plea which is inconsistent with the defence, for he asks, how is the judgment to be entered, supposing the defendant should fail upon his plea and prove his set-off? The plea the defendant has adopted, may be called the general issue in debt, since the new rules; but it certainly was not the general issue adverted to by the statute of set-off. The defendant should have pleaded *nil debet*, according to the old

(a) 5 M. & S. 164.

and have contended that the judges were pre-
cluded from depriving him of the right to plead that

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the court then called upon

to support the rule. This case is within the
provisions of the 3 & 4 W. 4. c. 42. s. 1., and consequently
judges had no authority to do away with the old
general issue, and deprive parties of the benefit of
giving a notice of set-off. If the words of the 2 Geo. 2.
c. 13., are taken together, it will appear that the
notice of set-off is given by that statute, and may be
made available, either by pleading it, or by giving a
notice along with the general issue. Where the latter
method is adopted, the act gives the general issue the
effect of a special plea of set-off: for as all evidence
that is received at a trial must be received under some plea, and
in the present case the notice does not appear on
record, it is clear that by the statute the general
issue has the force of a plea of set-off. It is a similar
case to an action by the assignees of a bankrupt, in
which parties are required to give notice if they intend
to dispute the bankruptcy, but still the inquiry is not
into the validity of the debt by virtue of such notice. In *Fidgett v.*
Wright, the present point was not presented to the
consideration of the learned judge whose observation has
been cited. *Oldershaw v. Thompson* may be disposed of
by the remark that *non est factum* never amounted to a
general issue. With respect to the argument,
that the plea in this case is not a general issue, it is
contended that it is, being a mere substitute for the
plea of *nil debet*. The rule No. 3, in Covenant and
Condition provides "that it shall have the same operation
as a plea of *non assumpsit* in *indebitatus assumpsit*;"
consequently it is to be regarded as a general issue.

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LORD ALMOND C. B.—I am of opinion that this rule must be discharged. At the trial it determined, after a summary consideration of the new rules of pleading, that the defence of set-off must be pleaded, for their language is peremptory. But I thought that there might be a question, whether the judges had power to make those rules, inasmuch as it was urged that a set-off was allowed to be given in evidence under the general issue by the 2 Geo. 2. c. 22. s. 13.; and therefore it fell within the proviso of the 3 & 4 Will. 4. c. 42. s. 1. I conceived however that the intention of that proviso was to except only those cases in which the general issue was given, as a protection to persons having public duties to perform, as to magistrates and constables, under the 21 Jac. 1. c. 12. s. 5, and that class of statutes where the like privilege is granted to particular individuals engaged in private enterprizes. The statute of set-off applies generally to all persons, and is not intended to confer a particular benefit on any party. But whatever doubt may arise on the language of that act, Mr. *Hayes* has shown in his argument that it does not give a defendant the power of pleading the general issue, but merely that he may use a set-off as a defence. The statute proceeds to provide, that at the time of pleading the general issue, notice of the debt intended to be insisted on shall be given, otherwise it shall not be allowed to be proved in evidence. It has been very properly observed, that this provision is a restriction and not a privilege; and that the statute introduced no relaxation in the mode of pleading. It seems to me, therefore, that the case of a set-off does not fall within the proviso of the 3 & 4 Will. 4. c. 42. s. 1., and that the judges did not exceed their powers in making the rule in question.

PARKE B.—I think that the ruling of the Lord Chief

on in this case was right, and that the judges were prevented from framing the rule in question, inasmuch as it is not within the proviso. [His Lordship read the proviso.] The judges certainly had no idea that this clause was intended to restrain them from making the regulation they did as to the defence set-off. Still they may have been mistaken, and we know not to say whether they were authorized or not. I am happy that the ingenious argument of Mr. Hayes enables me to say they were, and to carry the rule into effect. It appears to me that the proviso was intended to apply to persons in public situations, and not to private individuals. Then let us look at the statute of 1805. No act of parliament gives a party the power to plead the general issue, for he had that power at common law; but it enables him to give matter in evidence under it which would otherwise be inadmissible. The statute in question did not confer on a defendant the power to give a set-off in evidence under the general issue; but it made a set-off a defence, and from that moment it might have been given in evidence under the general issue, had it not been restricted; therefore, the act proceeded to require a notice to be given before it should be admissible. There is great weight in the argument, that if this defendant was still entitled to give a notice of set-off, the plea he put forward is not that general issue under which he could have availed himself of such notice. Therefore it seems to me, upon these grounds, that the defendant should not give evidence of his set-off under the notice, which was wholly inoperative. The verdict for the plaintiff must therefore stand, and the defendant must bring an action for his cross-demand.

BOLLAND B. concurred.

Rule discharged.

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RICHARDSON and Wife against ROBERTS

Where in assumpsit, to which the only plea was *non assumpsit*, it appeared at the trial that a sum of money had been paid to the plaintiffs after action brought, the court on motion after verdict (the payment not being denied) allowed the damages to be reduced by the sum paid.

Quere, if evidence of payment either before or after action brought, is admissible in evidence in reduction of damages?

ASSUMPSIT for money had and received, Plea: non assumpsit. At the trial before Lord Abinger C. B., at the *London* sittings after *Hilary* term, the plaintiffs proved an acknowledgment by the defendant that he had in his hands the sum of 100*l.* belonging to them. The defendant offered to show in reduction of damages, that he had paid 50*l.* to the female plaintiff since the commencement of the action. The Lord Chief Baron thought the evidence was inadmissible under the plea, but allowed proof of it to be given in order to save the parties expense; and a verdict was found for the plaintiffs for the 100*l.*, his lordship giving the defendant leave to move to reduce the damages to 50*l.* in case the court should be of opinion that the evidence should have been received.

Steer having obtained a rule accordingly,

Hoggins now showed cause. It is required by the rule of *Hilary* term, 4 *Will.* 4. Assumpsit, No. 3, that payment shall be specially pleaded; and the word there evidently means payment before action brought. The 17th rule applies to payment after the action is commenced, and requires that where money is paid into court, it shall be pleaded in bar of the further maintenance of the action. That course might have been adopted in the present case. It certainly has been held, that payment before action brought may be given in evidence to reduce the damages; but here the payment was commenced after the action, which is a material distinction.

LORD ABINGER C. B.—This is not a motion for a new trial, but merely an application to reduce the amount of the verdict by the sum paid after the action was brought, the payment of which is not denied. We think, therefore, that the verdict should be reduced.

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PARKE B.—There is no doubt that a special plea of payment after action brought, might have been pleaded in this case. The same reason exists for allowing evidence of payment after action brought as before, namely, to reduce the damages; but whether it has been properly decided that payment before action brought may be given in evidence under the general issue, is another question. It certainly was so held by Lord *Denman* at *nisi prius* in *Lediard v. Boucher* (a), and he afterwards mentioned the case to the other judges of the King's Bench, who concurred. The same point was also ruled by the judges of the Common Pleas in *Shirley v. Jacobs* (b).

ALDERSON B.—The court give no opinion upon the question whether the damages may be reduced by evidence of payment. They decide this case on its special circumstances.

Rule absolute.

(a) 7 Car. & P. 1.

(b) 2 Bing. N. C. 88.



WRIGHT *against* BARRACK and Another.

An assign-
ment of a bail-
bond was exe-
cuted by the
under-sheriff
in the presence
of the plaintiff
in the action
and another
person.

Held in-
valid, the sta-
tute of the 4
Anne, c. 16.
s. 20. requiring
the assignment
to be made in
the presence of
two *credible*
witnesses, i. e.
disinterested
persons.

An authority
from the sheriff
to the under-
sheriff to exe-
cute the as-
signment in
his name need
not be shown,
as the latter
is possessed of
all the autho-
rities belong-
ing to the of-
fice.

DEBT by the assignee of the sheriffs of London upon a bail-bond. The plea alleged that the assignment had been made in the presence of one credible person only, traversing the allegation that it had been made according to the statute; whereon issue was joined.

At the trial during the sittings in *Hilary* term last before *Alderson* B. the bail-bond was produced, with an assignment to the plaintiff indorsed upon it, purporting to be executed by the sheriffs. Their names were in fact signed by the under-sheriff in the presence of the plaintiff and another person, who were the two parties attesting the execution. *Platt*, for the defendant, took two objections; first, that the assignment was not valid, inasmuch as it was not executed as required by the 4 *Anne*, c. 16. s. 20. in the presence of two credible witnesses, the plaintiff being incompetent, on the ground of interest; and, secondly, that no evidence was given of the under-sheriff's authority to sign the names of the two sheriffs. The learned judge overruled the objections, and directed the jury to find for the plaintiff, giving the defendants leave to move to enter a nonsuit.

Platt in the course of the same term moved accordingly, and renewed the two objections taken at the trial. On the second point he contended, that it ought to have been shown that the under-sheriff had authority to sign the names of the two sheriffs to the assignment of the bail-bond, by some instrument of equal solemnity, for his being under-sheriff did not necessarily imply that he had such an authority.

le B. The sheriffs were bound to appoint an
heriff who belongs to the office, and possesses
authorities of the office.

le having been granted on the former ground,

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now showed cause. The words of the 4 Anne,
. 20. are, "That the sheriff or other officer, at
quest and costs of the plaintiff in such action or
his lawful attorney, shall assign to the plaintiff
in such action the bail-bond or other security taken
in such action, by indorsing the same, and attesting it
under his hand and seal, in the presence of two or
three credible witnesses." The direction to the sheriff
to execute it under his hand and seal *in the presence*
of credible witnesses; but there need not be any
indorsement by the witnesses, it being sufficient if the
indorsement takes place in their presence (a). Allowing
the plaintiff not to be a competent witness, the under-
writing may be considered as one of the witnesses.
[Binger C. B. He is the representative of the
plaintiff and cannot be a witness.] The question then
is, whether the plaintiff was a competent witness?
There is no authority on the meaning of the word
"credible" in this act, but it has been held, in nu-
merous cases under the fifth section of the statute of
1752 relating to the attestation of wills, that "cre-
dible" means competent; and if the same construction
be put on this act, then it must be admitted that
the plaintiff was not a competent witness. But it is
said that the clause in question is not to be con-
strued strictly as the section in the statute of frauds.
In that act, devises not executed according to its pro-
visions are declared to be "utterly void and of none

(a) See *Phillips v. Barber*, 1 Scott, 322.

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effect," but no such words are used in the act of *Anne*, neither does the latter, like the former, require an attestation by the witnesses. The difference of the language, therefore, shows that there was a difference in the intention of the legislature. *Busby* then cited *Hel-liard v. Jennings*(a), and *Wyndham v. Chetwynd* (b), with reference to the meaning of "credible" in the statute of frauds.

LORD ABINGER C. B.—This is the plainest point possible. The act of *Anne* requires the assignment of the bail-bond in the presence of two credible witnesses, but you want to show that by witnesses it meant the parties to the assignment.

PARKE B.—It is implied by the words of the clause, that the two witnesses are to be different persons from the assignor and assignee. The act intends that four persons shall be concerned in the assignment, namely, the sheriff, the plaintiff in the action, and two credible witnesses.

ALDERSON B. concurred.

Rule absolute.

(a) 1 *Ld. Raym.* 505 ; *Carthew*, 514.

(b) 1 *Burr.* 414.



1836.

Lewis against Ashton.

was an action of assumpsit for money lent, in which the defendant had been arrested and held for 42*l.* 5*s.* At the trial before Coleridge J., at Carmarthen assizes, the officer, who arrested the defendant, proved an admission by him, that the plaintiff at different times had lent him money, amounting nearly 20*l.* The jury found for the plaintiff, 18*l.*

Evans, on a former day in this term, obtained a rule to show cause why the defendant should not pay his costs under the 43 *Geo.* 3. c. 46. s. 3. The affidavit of the defendant, on which the rule was granted, stated that the plaintiff never lent him more than 1*l.*, and that he never made the admission by the officer. On showing cause, an affidavit of the plaintiff was produced, stating that she lent the defendant money at different times (which were set out in the affidavit) amounting to the sum for which he was arrested; that intimacy had been formed between them, and that the defendant had been induced, under the belief that he intended to marry her, to let him have the money, for which he had no security or memorandum, but which he frequently promised to repay. Admissions by the defendant that he owed the plaintiff different sums, exceeding the amount recovered by the verdict, were made by other deponents, including the officer who effected the arrest. The latter stated, that when the plaintiff said the plaintiff had lent him nearly 20*l.*,

The plaintiff had arrested the defendant for 42*l.* 5*s.* money lent, but at the trial only proved an admission by the defendant of the loan of nearly 20*l.*, on which she recovered a verdict for 18*l.* The defendant obtained a rule nisi for his costs under the 42 *Geo.* 3. c. 46. s. 5. on an affidavit, in which he swore the plaintiff never lent him more than 1*l.* On showing cause, an affidavit was produced from the plaintiff, stating she had lent him money at different times amounting in the whole to the sum for which he was arrested, but it did not appear, either from her own affidavits, or from those of

other deponents corroborating her statement in many particulars, that she had any evidence of loans beyond the defendant's admission, which was proved at the trial. Although they believed that the whole sum was due, and that the defendant's affidavit was false, they held, that as the plaintiff had no reasonable ground for believing she could recover the amount for which the arrest was made, the defendant was ordered to pay his costs under the statute.

1836.

LEWIS

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he added, he was sorry he had not got more from her, as she had no witnesses to prove any thing, no one being present when she lent him the money.

Chilton and *E. V. Williams* showed cause. They cited *Preedy v. M'Farlane*, (a) as an authority that the court might look at all the circumstances of the case, and urged that the affidavits clearly showed the whole sum for which the defendant was arrested was due. They contended, that the act was not compulsory, and where the court saw that the justice of the case was with the plaintiff, they were at liberty to refuse the defendant's application.

Evans was heard in support of the rule.

PARKE B.—The difficulty of the case is to lay your finger on any one circumstance in the affidavits showing that the plaintiff had reasonable ground for thinking she had a probable cause to recover the amount for which the defendant was arrested. I cannot help saying, that I consider it is a hard case upon her, but still she ought not to have arrested another without being in a probable condition to prove her case. I am sorry for her, for I believe the defendant has made a false affidavit.

BOLLAND, ALDERSON, and GURNEY Bs. concurred.

Rule absolute (b).

(a) 5 Tyr. 355.

(b) See *Tipton v. Gardiner*, 5 Nev. & M. 424.

1836

DOE *d.* NASH *against* BIRCH.

EJECTMENT for a house, No. 119 *Crawford* Street, *Marylebone*. The demise was laid on October 1835. At the trial at the last *Middlesex* before Lord *Abinger* C. B. it appeared that the lessor of the plaintiff, was possessed of a long lease of the premises granted by Mr. *Portman*, and he employed *Chowles* as his agent to deal with the defendant for granting a lease to him of the above premises in order to turn it into an eating-house and shop. By agreement of *June* 1st, 1835, between the plaintiff, expressed to be agent for the lessor of the premises, and the defendant, the former agreed to let the latter to take the messuage, No. 119 *Crawford* Street, on lease for 7, 14, or 21 years, determinable at

The lessor of the plaintiff, being lessee for years of a house, let it to the defendant at a quarterly rent, the defendant agreeing within three calendar months to erect a shop front; it being further agreed that if he did not so erect it within that time, it should be lawful for the lessor of the plaintiff, or his agent, to

take possession of the premises, and the agreement should be null and void. The plaintiff immediately took possession, enlarged the ground-floor windows, made small alterations within the three months, and opened the house as an eating-house. The plaintiff brought ejectment for a forfeiture in not erecting a shop front. After the alterations had been made, and after the first quarter's rent became due, but before the ejectment was served, the lessor of the plaintiff, his son, who lived next door to the demised premises, called on the defendant for the rent. The defendant said he would pay it if the son would indemnify him a sum which he had paid for an increased rent due to the original lessor of the premises for carrying on a trade there. The indemnity was not given, and the rent was not paid. At the trial the defendant offered in evidence the original lease and the agreement, imposing an increased rent on the lessee, by way of penalty, if he carried on a trade to be carried on there, so as to explain the word "shop-front," as used in the agreement between the lessor of the plaintiff and the defendant, and to show that it was in its ordinary sense. The judge rejected the evidence as *res inter alios acta*, and left it to the jury, whether the defendant had erected a shop-front, which he had not.

But the lease was properly rejected, and that the proviso that the agreement should be null and void, if the shop-front was not erected in the time fixed, made it void, but only voidable, at the option of the lessor.

Also, that as it did not sufficiently appear that the son of the lessor of the premises had authority from his father to waive the forfeiture, or that the father had authorized the son to do so, the nature of the alterations going on before he authorized the son to do so, the rent which became due after the alterations were made, the question whether the forfeiture was waived by that demand did not arise; but *semble*, by the evidence, that had the son's authority been sufficient, the demand would have amounted to a waiver.

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DOE

d.

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the end of each separate term, at the option of the defendant. The defendant agreed to pay the yearly rent of 60*l.* in four even and equal payments; viz. on the usual feast-days, and that he would at his own expense, and within three calendar months, erect a shop-front, and otherwise repair, paint, paper, and whitewash the whole of the house, and keep the same in good and sufficient repair during the whole term, and at the end of either of the said terms would deliver it up in good and tenantable repair; and the said *Chowles*, for the lessor of the plaintiff, agreed that on the said shop-front being erected, and the said house and premises being put in good and sufficient repair, the said lessor of the plaintiff should execute the said lease, bearing date *Midsummer* 1835, from which time the rent was to commence, at the expense of the defendant. The parties further agreed, that in case the defendant did not erect the shop-front and otherwise repair the said premises as aforesaid, within three calendar months from the date of the agreement, it should be lawful for the lessor of the plaintiff, or his agents, to retake possession of the said house and premises, any thing in the agreement to the contrary notwithstanding, and that the agreement should be null and void; and that the defendant, in case he should not fulfil his engagement in the time specified, would forfeit and bind himself to pay 50*l.* to the lessor of the plaintiff, over and above any rent that might be due at that time (a). Under this agreement the defendant took possession of the house, which was a private one, and had been originally let in 1803 by Mr. *Portman* to one *Vale* for 99 years, subject to a covenant to pay the additional rent of 100*l.* quarterly if any trade was used in it, without a written licence from the lessor, and a power of re-entry

(a) See *Warman v. Faithful*, 5 B. & Adol. 1042.

ent was not paid. The defendant immediately d to make alterations by widening and height- both the ground floor windows a few inches ang them differently, but without putting up ection or entablature in front, or cutting out work between the windows, or affixing any ts to a bressummer (a), which the plaintiff's proved to have been always in the wall ready e them, should the premises ever be converted op. The door remained the same, but hori- on rails were laid down in front. The house opened as an eating-house and beer-shop. or of the plaintiff contended that this was not "shop-front" as the defendant had agreed to d that the lease was forfeited accordingly. l architects and surveyors, who swore that the t's alterations did not amount to erecting a ont" (b). The defendant's counsel contended / constituted a shop-front sufficient for the t's trade, and in order to explain the agree- erecting it, tendered in evidence the original taining the above covenant for increased rent if as carried on there, offering at the same time such lease to the plaintiff, and show that the t had been distrained on for the increased had paid it accordingly. Lord Abinger C.B. pinion that the lease was not admissible in having nothing to do with the contract of 5, which bound both the parties to it, without to a former one between other parties (c).

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eam called a *bressummer* without, was sworn to be called a . Entablature consists of architrave, cornice, and fascia.
 ve d. *Dalton v. Jones*, 4 B. & Adol. 126.
Walter v. Maunde, 1 Jac. & W. 181; and *Souter v. Drake*, 5 B. , as to the implied engagement by the lessor, that he has title the terms used.

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vs
Plaintiff
of
Brent

The defendant then proceeded to show that the lessor of the plaintiff had waived the forfeiture, and called the son of the lessor of the plaintiff, who said he acted as his agent during his illness, after the agreement was made by Charles. This witness lived next door and saw the alterations making without making any objection. He proved the sending a notice to the defendant on 8th July 1835, that in the original lease under which the premises were held, there was contained a covenant not to use them for the trade of a victualler, or as a public house, beer or coffee shop, or for any other art, trade, or business whatsoever, and warning him not to use the premises in any such manner, and pain of being held responsible for any damages or expenses which the lessor of the plaintiff might sustain by the defendant's breach of the covenant. He also proved, that after Michaelmas 1835 and without his father's order, he demanded the rent then accrued due from the defendant. He said he would pay if the witness would give an indemnity against Mr. Portman's demand of the additional rent, and on his declining to do so, refused to pay him the rent due. The action was brought on the son's authority, without communicating with his father, who was ill and incapable of business. Lord Abinger told the jury no waiver of the forfeiture was proved, that a trade might be carried on and goods exposed in a common window, without any shop-front, and left it to them to say whether or not the defendant had erected a "shop-front" according to the agreement, giving leave to the defendant to move to enter a nonsuit, if the court should be of opinion that the forfeiture had been waived.

Erle moved in last term to set aside the verdict for the plaintiff and enter a nonsuit, or for a stay of proceedings, on two grounds; first, that the lease had been

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improperly rejected; and secondly, that the forfeiture had been waived by the lessor of the plaintiff. He insisted that the defendant was entitled to show that the carrying on a trade on the premises would create a forfeiture of the term, so as to raise the inference that the stipulation in the agreement to erect a shop-front must have a different meaning from that usually conveyed by it. The court refused the rule on that point, saying, that the meaning of a contract between A. and B. could not be shown by a previous contract between A. and C. On the second ground, they granted a rule to enter a nonsuit, with an alternative of staying the proceedings, on the ground that the action was brought without the authority of the lessor of the plaintiff.

Bompas Serjt. showed cause. First, the lessor of the plaintiff had no option to waive the forfeiture, as in the case of a power of re-entry for breach of covenants; for the agreement was by its terms to be null and void if the condition precedent of erecting a shop-front was not performed by the defendant. (*Parker v. De d. Bryan v. Banks* (a), is a stronger case than the present on this point. You say that as the lease is by its terms to be absolutely void in a certain event, which has happened, the forfeiture cannot be waived, even by the lessor's receipt of rent; but the argument on the other side will be, that since *Doe v. Banks* there is no such distinction as you suppose between a lease being to be *ipso facto* void, or to be only voidable, at the election of the lessor. The tenant there wanted to get rid of an onerous lease, as "void to all intents and purposes" by its own terms, on his own non-payment of rent, but the court held that the landlord had

(a) 4 B. & Ald. 401; S. C. at nisi prius, Gow, 220 n.; see *Doe v. Woodbridge*, 9 B. & Cr. 376.

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still an option to avoid it or not, as he pleased. *Alderson B.* Assuming that the forfeiture which had accrued could not be waived by the landlord, a subsequent receipt of rent becoming due after the act occasioning the forfeiture was complete, might make the party a tenant from year to year against his lessor, though it would free the latter from the lease.] In *Doe v. Bancks* the tenant sought to take advantage of his own wrong. [Lord Abinger C. B. Our impression is, under the circumstances of this case, that the demand of rent which was made by the son would not be sufficient to establish an election by his father, the lessor of the plaintiff, to waive the forfeiture. In any case where a lease becomes *ipso facto* void by the neglect to do a stipulated act, a subsequent acceptance of rent cannot amount to a waiver of the forfeiture; and whether acceptance of such rent will make a party tenant from year to year, or not, the court are of opinion that a demand of it will not.] All the cases of waiver of forfeiture by subsequent acceptance of rent, are cases where both parties act, one in receiving and the other in paying the rent, and the landlord gets an advantage by receiving, from the party treating him as tenant, that rent which the other thus loses. [*Parke B.* No. Distress and continuance in possession are the act of one party only, the lessor, and yet may amount to a waiver of a precedent forfeiture.]

Secondly, if the lease was only voidable, and the lessee of the plaintiff had the option to avoid it as forfeited, or to waive its forfeiture, the demand of rent by his son will not amount to such a waiver, for it does not admit any then existing tenancy. [*Parke B.* In *Green's case* (a), the lessor's calling a man "his fermor" in a receipt, for by-gone rent, was held sufficient evi-

(a) Cro. Eliz. 3.

e of the lessor's having waived a forfeiture for non-payment of rent, and a full declaration of his meaning to continue him his tenant, though the receipt itself, without that expression, would not have amounted to proof. That was a strong case, and approaches the present.] It is submitted that the bare calling on a man to pay rent will not constitute a waiver, followed up by some distinct act of the parties, payment and receipt of rent falling due after the forfeiture had accrued; for till such receipt by the tenant, with knowledge that the forfeiture has actually (a), the transaction is incomplete.

Lastly, a knowledge by young *Nash* of the forfeiture having accrued (b), was not a sufficient knowledge of that fact by his father, the lessor of the plaintiff, as it can be assumed from his having demanded rent on his father's behalf, during his illness, and that he had general authority to do every other act respecting the estate of which the father was capable. [Lord *Erle* C. B. For example, to sell it.] The taking on himself to waive the forfeiture would have the same effect, viz. depriving the lessor of the plaintiff of the property forfeited to him (c).

Erle (with him) supported the rule. As to the point, that the lease to the defendant was altogether avoided by his not having complied with its terms, *v. Bancks* (d), already cited, is to the contrary; *Arnsby v. Woodward* (e), has since decisively established that a lease containing such terms as these is rendered voidable by breach of the covenant to which its defeazance is attached, so that the lessor's

See 2 T. R. 425; Cowp. 243, 803; 9 East, 314, n.

See *Doe d. Sheppard v. Allen*, 3 Taunt. 77.

See *Burnell v. Brown*, 1 Jac. & W. 168.

4 B. & Ald. 401.

(e) 6 B. & Cr. 519.

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d.

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of the lease. Then the lessor of the plaintiff taken to have authorized his son to demand and thus to waive the forfeiture.

Lord ABINGER C. B.

C. B.—I agree that the cases the construction of the word "void" in the agreement, is that which is on behalf of the defendant, viz. that it only; but we entertain great doubt what authority to waive the forfeiture by an would have that operation, was sufficiently

PARKE B.—The first point having been decided by the authorities which show the lease void only at the election of the lessor, the question is, whether the son had authority to waive the forfeiture. He very probably had authority to receive the rents, but whether empowered to create a new tenancy by forfeiture of a former one, or to receive the nature of alterations then going on in the premises, so as to bind his father, is a very different question. Had it been proved that the father had notice of the improper method in which the alterations were going on, and still allowed the son to receive the rent, that would have made

the defendant show that the forfeiture did not
 All events, but that it was only at the option
 of the defendant to avail himself of it if he chose to do
 so. It was an absolute and qualified demand for the
 by a person sufficiently authorised to make the
 and amounted to a waiver of the forfeiture, and
 to the estate of the defendant, which I quoted from the
 of the lease. Then the lease was taken to have
 taken to have authorised him to have the lease
 son and GURNEY Esq. concurred,
 and thus to waive the forfeiture.

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 d.
 Nisi
 v.
 Breve

Rule discharged.

Lord ALBANY C. B. I agree that according
 to the cases the construction of the agreement is that which is
 "in the agreement is that which is contained
 against KRISTMAN and Another, Executors of
 KRISTMAN deceased.

ASSUMPSIT. The declaration stated, that on
 October 1814, the plaintiff was about to
 land, and had delivered a certain instrument
 of 40l. to the defendants' testator, who
 and taken it in exchange; and there-
 consideration that the plaintiff had agreed to
 of him, on his return to England, a grand
 e, the testator undertook to sell him such
 pianoforte, and to be accountable to him for the
 in part-payment thereof. Averment, that the
 returned to England after the testator's death,
 ed to purchase a grand pianoforte, and to pay
 able price thereof after deducting the said
 that the defendants refused to sell it.

first, non assumpsit by the testator; se-
 cond, after the making of the promise by the

In an action
 for not deli-
 vering a piano-
 forte to the
 plaintiff, ac-
 cording to
 the agree-
 ment of the
 defendants'
 testator to do
 so at the
 plaintiff's re-
 turn to Eng-
 land, the exe-
 cutors pleaded
 that the plain-
 tiff had bought
 another piano
 from the tes-
 tator, and ac-
 cepted it in
 satisfaction
 and discharge
 of the testator's
 promise
 stated in

tion. No specific evidence being given in support of the plea, it was held
 as of twenty years from the making a contract to be performed in a future
 not of itself prove the allegations in the plea, whether taken as a plea of
 satisfaction of the original contract, or of performance of it.

and discharge of the promise of the 1 was taken on these facts by the replicat . At the trial at the *London* sittings after *mas* term before Lord Abinger C. B. agreement, signed by the testator, was plaintiff. "I hereby acknowledge the able to Signor Siboni in the sum of 4 ment of a grand pianoforte, which he chase of me on his return to *England*, 40/. being the value of an instrument taken of him in exchange. (Signed). J. *Broad Street*, *October 29*, 1814." The pianoforte maker, died in 1830. The brought *December 9*, 1834. The nesses proved that the plaintiff was 1834, but it did not appear whether been in *England* from the date of the the time of bringing the action, or the manded the piano of the deceased. There no evidence of the plaintiff's having been between *October 1814* and *November 18* but it was contended that, after the 1 years, the jury would presume the case been satisfied. The lord chief baron that, as the plaintiff was not proved absent from *England* during the whole

to have been satisfied. Verdict for defendants, a new trial having been obtained in last term for misdirection, on the ground that the defendants were bound to prove the contract specially alleged in their plea,

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Telly and Hoggins showed cause in this term. This dict may stand notwithstanding the plea was not supported by testimony, for it amounts to a plea of non-performance of the contract laid in the declaration, which is what the jury were warranted in presuming to have taken place at some time or other in the long interval. Even if the grand piano was not to be delivered by the testator to the plaintiff till his return to England, he may have been here frequently between October 1814 and the latter end of 1834, when this action was brought. [*Parker B.* The plea is not of non-performance, but that a grand piano was given by the testator and accepted by the plaintiff in satisfaction of the testator's promise; not however alleging that it was accepted at the particular time when the contract was to be performed, viz. at the plaintiff's return to England.] That return was not a part of the contract, or a condition precedent to it; for had the plaintiff never returned, he could have obliged the testator to supply the piano. [*Bolland B.* Had he died abroad, the executors could have enforced the contract.] The plaintiff contemplated returning at the time, and that condition has been introduced into the contract; but to make it essential, it should appear that if it had not taken place, the deposit could have been recovered. [*Parker B.* Could the deceased, *Kirkman*, have pleaded the statute of limitations?] That is a difficulty, for at the time of making the contract the parties clearly contemplated the plaintiff's going abroad. It can never be

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said that, if the plaintiff had never left the country, or had gone abroad and resolved not to return here, or was prevented from doing so by war, the contract should not take effect. [Lord Abinger C. B. Could time begin to run till his return? Could not the deceased have refused an application for the piano made by the plaintiff's agent in his absence abroad?] It is submitted not. [Parke B. Assuming his return to be an essential part of the contract, his rights did not accrue till he returned. But in any event it seems to me that a special request would be necessary in this case. Though payment of a debt may be presumed after a lapse of twenty years, I doubt if a special request to perform a contract can be presumed on a like ground.] It might be presumed with as much reason as the delivery of the piano, which they would be justified in presuming in the other case. This would be in terms as well as substance a plea of general performance, had it not gone on to allege the plaintiff's acceptance of the piano in satisfaction. [Parke B. It would have been bad without that allegation. It will now suffice to raise the point now relied on for the defendants.] The jury were warranted in their finding, and there was no misdirection.

Cresswell and *Martin* for the plaintiff supported the rule. The statute of limitations could only begin to run from the time of the plaintiff's return to *England*. [Parke B. And from the time of the request.] Then how can that event be other than an essential part of the contract, when the time of its performance was to depend on it? No presumption that the contract was performed could arise before that event happened. If he had gone and remained abroad altogether, the statute would only begin to run from the time when the

abandoned the contract. [Lord Abinger C. B. went abroad before requesting the plaintiff to the contract, and stayed twenty years, would the jury presume payment, or that the plaintiff abandoned the contract, or that it had been paid?] In the case of a bond of more than twenty years old, upon which no payment of interest or acknowledgment has been made during that time, the usual presumption is, that it has been paid; but where the obligee was abroad all that time, the presumption would not arise. Then the jury ought not to have decided that they might presume the performance of the contract, for, even taking the plea to amount to a denial of performance, the defendants must have proved it specifically as laid, or shown that the plaintiff returned here more than twenty years after the action was brought, so as to bring the case within the usual presumption. [Alderson B. The question is, whether, if the plaintiff had remained here, he could have legally demanded performance of the contract?] He could not, nor does it appear that he ever made any such demand. The bargain, if it was of his own making. [Parke B. I doubt if the agreement should be thus strictly construed, as I do not perceive of what importance to the testator the plaintiff's personal return to this country, or his performance of the performance of the contract, could be, though he was not called on to furnish the grand price during his lifetime, his death being the act of God, which cannot excuse his executors from completing a contract entered into by their testator in his lifetime.] The plaintiff might have good reason to attach weight to his privilege of buying the grand price when he returned, and if he had died abroad without performing it, the testator would have had the ad-

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Simpson
v.
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— — —
 SIBONI
 v.
 KIRKMAN
 and Another.

vantage of not refunding the 40*l.*, though his executors would be liable to perform his contract if the plaintiff survived. [Lord *Abinger* C. B. The executors would be bound either to refund the 40*l.* or get some other person to complete the testator's agreement.] If the plea was designed to set up as a defence that a new contract was taken in satisfaction of the original one, it should have been proved specifically in evidence. But as it does not appear that the plaintiff ever was in *England* between the 29th *October* 1814 and the 29th *October* 1834, his remedy is not barred by the rule of presumption alluded to.

The *Court* took time to consider this case, stating it to be of a very peculiar nature ; and afterwards in this term made the rule absolute for a new trial, on the ground that the chief baron had not left it to the jury to determine whether or not they affirmed the existence of the specific contract laid in the plea. The second trial took place at the sittings in *Trinity* term 1836, and the evidence not being materially altered, nor any proofs adduced in support of the plea, *Parke* B., who presided, directed a verdict for the plaintiff. A bill of exceptions was tendered to the summing up, but to avoid the expense of going before a court of error,

Kelly moved in arrest of judgment. This was a personal contract with the testator for a pianoforte of his own making, and as he died before the plaintiff demanded it, his executors are exonerated. [*Parke* B. Where does it appear on the record that the deceased was a pianoforte maker, so as to raise the desired inference that the instrument dealt for was to be of his own making? and if that cannot be implied, how can this contract for delivering a piano be more a personal

than one for delivering cheese? Executors are to perform or complete not only the contracts of the testator, which were broken in his lifetime, but also which remained unbroken at his death, in the single instance of a contract by him to do a work in which his personal peril, skill, and labour were the objects in view; for example, a work of painting or sculpture, where it is supposed to be implied that the employer took the chance of his death, and contemplated that event as putting an end to the contract.] This contract was not broken in the testator's lifetime. Then, to perform it, the defendants were obliged to carry on his trade, which, as executors, they are compelled to do. So that it never could have been said that they should furnish this piano. [*Parke B.* Executors need not carry on their testator's trade in order to perform this contract, for if he has not a piano, it is not necessary that they had a piano for the purpose, they could procure one, and exchange it with the plaintiff. This case resembles *Quick v. Ludbarrow* (a), a man having covenanted to build a house, his executors were held liable to complete the building at his death; whereas *Marshall v. Broadhurst* (b) is the converse of that case, for there the deceased was to build a gallery, but having died before it was built, his executors built it with his materials; and the court held that they might sue as executors, and for the value of them.] The difference between the two cases is, that here the performance of the contract depends on a future contingency, which did not occur for twenty years; whereas in *Marshall v. Broadhurst* the contract was to be immediately executed, and the deceased had brought the materials to the place where they were wanted. Can it be said to

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(a) 3 Buls. 50.

(b) 1 Tyr. R. 348.

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have been the intention of these parties that at whatever distance of time it was possible for the plaintiff to return to *England*, these executors were to have funds of their testator in hand ready to perform his contract, though the plaintiff might live a very long period, but never return to this country? [Barke B. You cannot cite any case to show that executors are not liable to perform all contracts entered into by their testator, except such as were for works of personal skill or involving personal risk. Suppose he had covenanted to indemnify a succession of persons for fifty years against a particular set of events, would not his executors have remained liable during that time?] We cannot on this record take judicial notice that the deceased was a pianoforte maker of greater skill or ability than others of that trade. He might be only a dealer in such instruments. We are not warranted therefore in assuming that the contract was for a piano to be made by the testator himself.]

Lord ALINGER C. B. — Were I called on for my opinion, it would be against granting a writ to arrest the judgment. Had the declaration stated the deceased Kirkman to be a pianoforte maker, as on the former occasion I thought it did, I might have entertained a different opinion. The remedy by writ of error remains open.

Rule refused.

WHITE against ANSDELL.

1888!

A bond of indemnity recited in its condition a deed of dissolution of partnership between the plaintiff and I., in which deed was recited an agreement between them, that

“ subject to the taking and adjustment of the copartnership accounts, as therein mentioned,”

all the stock in trade and partnership effects should belong absolutely to I., and all the debts due

that the plaintiff, if damnified, was damnified by his own wrong. first, that on this issue the deed of dissolution of partnership could not be evidence for the defendant, in order to show that the plaintiff had not per-covenant by the plaintiff to adjust the partnership accounts within seven months after the execution of the deed, and that he had not paid over to I. a balance claimed to be due to him on such adjustment; and, secondly, that the plaintiff was not entitled to show that the bill of I.'s attorney was much less than the plaintiff's, for defending the same action.

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thereof, and all actions to be brought against the plaintiff and *Isaac* in respect of the copartnership debts and transactions. Breach, that one *Mitchell* had sued the plaintiff and *Isaac* for a partnership debt in C. P., that the plaintiff was arrested and held to bail, that he justified bail, and that *Mitchell* having recovered a verdict in the action for 35*l.* the plaintiff, on the 29th April 1834 rendered himself in discharge of his bail, and remained in prison from that time till the 18th of June following, when he was discharged, after having incurred heavy expenses, and being still liable to have judgment recovered against him for the amount of the debt and costs in such action. Averment, that the plaintiff had incurred great expenses in procuring special bail, and had sustained great damage by the imprisonment, and that the defendant had not performed the condition of the bond by indemnifying the plaintiff against the said partnership debts.

Pleas: first, *non est factum*; secondly, that if the plaintiff had been damaged, he had been so damaged of his own wrong, and through his own means and default. Issue thereon.

At the trial at the *Guildhall* sittings after last *Hilary* term, it appeared that after the dissolution of partnership, *Mitchell*, who held a bill for 35*l.*, accepted by the plaintiff and *Isaac* as partners, obtained a verdict against them upon it for that amount. The plaintiff rendered himself in discharge of his bail, but being superseded, was afterwards discharged, as stated in the declaration, having incurred a bill of 48*l.* 3*s.* to his attorney for defending the action. Neither of the above sums had been paid, and the plaintiff refused *Mitchell*'s request to give him a *cognovit*. The plaintiff's case having closed, the defendant's counsel offered to produce the deed of dissolution, in order to show that the agreement of *Isaac* and the defendant

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manify the plaintiff against the partnership debts
 led on the contingency whether the partnership
 ts were adjusted with *Isaac* within seven days.
 had proposed to show that the plaintiff had not
 uted his accounts, though *Isaac* had delivered
 account charging him with a large debt as the
plaintiff. The lord chief baron, who presided,
 d the evidence as inadmissible to control the
 ion stated in the condition, which he held to be
 e for payment of the partnership debts, though
 contemplated the performance of the stipulations
 made. He was more strongly of this opinion, as
 endant had not craved over of the partnership
 e as to set it out on the pleadings, and thus per-
 ce of it made as *formal*, and thereby give the plain-
 opportunity of taking issue on it. The defend-
 ant then called the attorney who had defended
 against *Mitchell's* action, to prove that his bill
 of service was under 10*l*, but the lord chief
 refused to allow the question as *res inter alios*.
 Another point was raised, on the authority of
v. Hughes (a) and *Gillatt v. Rippat* (b), that as
 intiff had gone to the expense of defending the
 by *Mitchell* unnecessarily, without the know-
 or assent of the defendant, the latter being a
 surety was only liable to pay the costs of the
 The lord chief baron held, that as it had been
 ease specifically proved that the plaintiff could
 the debt, the jury were to give him such da-
 as they should think him entitled to, subject to
 action, whether the costs had been incurred
 ly or without adequate cause. The jury found
 let for the plaintiff for 48*l*. 3*s*., being the amount
 costs incurred by the plaintiff in defending the
 by *Mitchell*.

body & M. 247.

(b) *Id.* 406.

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Egle moved for a new trial, on the ground of the rejection of the evidence offered at the trial. First, as to the deed of partnership, the operative part of the condition which is to be performed by the defendant, though absolute in terms and general, is in truth limited, when coupled with the recitals by which it is preceded; for it secures the payment of the said partnership debts, viz. those mentioned in the recital, and the amount of which was by the deed to be adjusted within seven days. The chief baron said he did not recollect any instance of offering a deed in evidence in an action on a bond, in which it was not recited. But the deed was in fact recited in this bond. *Parke B.* Not in such wording as to include or refer to that covenant in it, by which the indemnity given by the defendant against the partnership accounts was to depend on their adjustment in the way there stipulated. *It is difficult to say what the effect of this plea is under these circumstances. It is a well-known plea, and raised the question whether the plaintiff, by his own wrong, prevented the defendant from having to pay Mitchell's claim on the partnership. The plaintiff as retiring partner, was to leave his stock in trade with Isaac the continuing partner. Then the non-payment of the debt by the latter was the plaintiff's default. Lord Abinger C. B. Your contention was, that the obligation to indemnify against the partnership debts was only conditional on the adjustment of the accounts, and that therefore the plaintiff had not performed the condition on which the defendant's liability depended. You have not shown, in pleading that the bond was only conditional. Alderson B. Is not the defence this? I agreed to indemnify, but not against damage incurred by your own wrong. Parke B. Under this plea you might have shown that the plaintiff might have defended Mitchell's action with success, on a*

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St.

House.

round which the plaintiff never took in a proper manner. I cannot find that the absolute payment of the partnership debts by Isaac is made subject to any adjustment of the partnership accounts within even days. That was a collateral agreement. The non-payment to Isaac by the plaintiff was a default of the latter, which disabled him from paying the debt due to Mitchell, so that any damage to the plaintiff occasioned by the non-payment by Isaac was by his own wrong. At all events the defendant had a right to show, in reduction of damages, that the expenses incurred by Isaac's attorney, in defending him in the action by Mitchell, were much less than the plaintiff claimed, as incurred by himself in defending the same action; and, therefore, the charges in the plaintiff's bill must have been exorbitant or unnecessary.

Lord Abinger—The defendant's attorney did not do the defendant's case as well as the plaintiff's did, and the defendant's attorney was not as diligent as the plaintiff's.

PARKER B.—The special damage here claimed was made up of other matters besides the ordinary expenses of defending an action, viz. the imprisonment of the plaintiff, and his expenses in rendering himself in discharge of his bail, and obtaining his supersedeas. The defendant was well off in having the case so favourably left to the jury; for as his covenant bound him to pay the partnership debts, and by his breach of it he drove the plaintiff to incur expense and suffer imprisonment, the latter may recover damages for the whole. The evidence of Isaac's attorney's bill was properly rejected, as was also the partnership deed, which, however, is absolute as well as the condition of the bond: we have inspected both.

The other barons concurring.

Rule discharged.


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BRIND against HAMPSHIRE.

In trover for a bill of exchange, it appeared from the pleadings, that the defendant (*Hampshire*), who was resident in *England*, received it from the payee (*Usher*), who lived at *Belize*, specially indorsed by him to the order of the plaintiff's wife (*Brind*). The defendant was directed by *Usher* to hand over the bill to *Mrs. Brind* for her schooling of his children. The defendant got the bill accepted by the drawees in *England*, gave *Mrs. Brind* notice, by a letter sent by post, that he had received and held the bill for the purpose directed by *Usher*, and desired *Mrs. Brind* to inform him when and how it should be delivered, promising to attend to such information by her; but before the plaintiff or *Mrs. Brind* demanded the bill, and while it remained in the defendant's hands on the direction and for the purpose above described, *Usher* countermanded the direction he had first given, and ordered the defendant to keep the bill and its proceeds in his hands, and to have a fair scrutiny into *Mrs. Brind's* accounts, and after that to pay her what might be due to her. No such scrutiny took place, though the defendant was ready to make it, and the defendant detained the bill.

Held, on demurrer, that as the original direction by *Usher* was countermanded by him before the bill had been handed over by the defendant, or accepted by the plaintiff or *Mrs. Brind* in payment of the debt due by *Usher*, the defendant was not liable to an action of trover for the bill.

TROVER for a foreign bill of exchange, stated to be dated 28th August 1835, and to be drawn by *Hyde and Forbes* on and accepted by *Hyde & Co.*, for the payment to *Usher*, or order, of the sum of 300*l.* sterling at ninety days sight, and purporting to be indorsed by *Usher* to the order of *Mrs. Brind*, the wife of the plaintiff. Pleas: first, the general issue; secondly, that the plaintiff had no property in the bill; thirdly, that heretofore, to wit, on 21st October 1835, defendant received the said bill from the said *Usher* from parts beyond the seas, to wit, from *Belize*, in *Honduras*, and was then directed by the said *Usher* to hand over to *Mrs. Brind*, the wife of the plaintiff, the said bill of exchange; but before the defendant could hand over to the said *Mrs. Brind* the said bill of exchange, and without any negligence or improper delay on the part of the defendant, and before any demand of the said bill of exchange by the plaintiff or the said *Mrs. Brind*, and whilst the same was in the hands and possession of the defendant on the direction and for the purpose aforesaid, to wit, on the 24th November 1835, the said *Usher* countermanded and revoked the said direction, and then directed the defendant to keep the said bill of

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ange and the proceeds thereof in his the defend-
 hands, and not to hand over or deliver the said
 f exchange, or pay the proceeds thereof, to the said
Brind or the plaintiff; whereupon he the de-
 nt, pursuant to such revocation and countermand,
 ubsequent direction of the said *Usher* to keep the
 ill in his the defendant's hands, and the proceeds
 of, as aforesaid, and not to pay the same to the
 Mrs. *Brind* or the plaintiff, on the day and year
 said, did keep the said bill of exchange, and then
 ned and still detains the same in his the defend-
 hands and possession, and refuses to hand over or
 r the same to the said Mrs. *Brind* or the plaintiff,
 e cause aforesaid, and as he the defendant might
 still may lawfully do for the cause aforesaid, and
 is the detaining, &c. whereof the plaintiff hath
 lained &c.

plication, that before the bill was received by the
 dant as in the said plea mentioned, to wit, on the
 rst aforesaid, the same had been indorsed by the
Usher, and he by that indorsement had ordered
 appointed the said sum of money in the said bill
 oned to be paid to the order of the said Mrs.
L, the wife of the said plaintiff; and that at the
 of the detention thereof, the said indorsement re-
 d thereon in full force and effect: And the plain-
 rther saith, that afterwards and after the receiving
 said bill by the defendant for the purpose in the
 plea mentioned, and before the detention thereof,
 efore the countermand and revocation in the said
 mentioned, to wit, on the day first aforesaid, he
 id defendant caused the said bill to be presented
 ceptance, and caused the same to be accepted by
 rawees; and that after the said acceptance, he the
 lefendant had and held the said bill for the plain-
 r the purpose aforesaid; and that after the said

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acceptance, and while the defendant held the said bill for the purpose aforesaid, and before the countermand and revocation in the said plea mentioned, to wit, on the day first aforesaid, the defendant gave notice to the said Mrs. Brind that he had received the said bill, and then held the same for the purpose aforesaid, and he then desired to be informed by the said Mrs. Brind when and how the same should be delivered, and he then undertook and promised that such information should be attended to, and the said defendant then requested the plaintiff to pay the expenses of the conveying of the said notice from him, the defendant to the said Mrs. Brind; and the plaintiff further saith, that in pursuance of such request, he the plaintiff did afterwards and before the said countermand and revocation to wit, on the day first aforesaid, pay the expenses of the conveying of the said notice to wit, &c. witness of the defendant afterwards, to wit, on &c. and notice.

Rejoinder, that at the time and after he the defendant received the said bill from the said Usher, he the said plea mentioned, the said bill remained, and thence hitherto has always remained, and still is in the hands and possession of the defendant as the agent of and for the said Usher, and subject to his direction, order, and control; and that whilst the said bill so remained and was in the hands and possession of the defendant, the said Usher, for good and sufficient reasons him thereto moving, did revoke and countermand the said direction, and then directed the defendant to keep the said bill of exchange, and the proceeds thereof, in his the defendant's hands, and not to hand over and deliver the said bill or pay the proceeds thereof to the said Mrs. Brind or to the plaintiff, as in the said plea mentioned: And the defendant further saith, that before and at the time, and after the defendant so received the said bill from the said Usher, the said Mrs.

Brind kept a school for the board, lodging, and educa-
 tion of young persons, and divers, to wit, three chil-
 dren of the said Osher were and had been at school
 with the said Mrs. Brind before and at the time the
 defendant received the said bill as aforesaid, and
 had during that time been educated, boarded, and
 lodged by the said Mrs. Brind, and the said Mrs.
 Brind, in respect of and for the said board, lodging, and
 education, had, before the said Osher remitted the said
 bill to the defendant for the purpose aforesaid, deliv-
 ered to him a certain account whereby the said Osher appeared
 to be indebted to the said Mrs. Brind in divers large
 sums of money, and the said Osher for a long space of
 time, to wit, before and at the time of the said board,
 lodging, and education, being supplied and given to
 the said children as aforesaid, and thence hitherto, had
 been and was, and still is resident in parts beyond the
 sea, to wit, at Belize in Honduras, and before he the
 said Osher did or could examine the said accounts so
 delivered by the said Mrs. Brind, he had forwarded
 and caused to be delivered the said bill of exchange to
 the defendant for the purpose in the said plea men-
 tioned; and the defendant further saith, that afterwards
 and before the defendant did or could deliver the said
 bill to the said Mrs. Brind, and whilst the same re-
 mained and was in the hands of the defendant as the
 agent of and for the said Osher, and subject to his di-
 rections as to the said bill, he the said Osher revoked
 and countermanded the said direction to the defendant,
 and directed him to keep the said bill and proceeds
 thereof in his the defendant's hands &c., and also then
 and there directed the defendant to have a fair scrutiny
 made of the said Mrs. Brind's accounts, and after a fair
 investigation to pay her what might be due to her;
 whereupon the defendant still being the agent of the
 said Osher, and acting under his directions, refused to

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been given by the defendant to the said therein alleged to be a notice that the defendant received the said bill for the purpose in that behalf alleged: And the defendant that such notice was sent by the defendant the general post to the said Mrs. Brind, defendant not having paid the postage Mrs. Brind, or the plaintiff, paid the same, which is the said expense of notice from him the defendant to the plaintiff in the said replication mentioned; and the plaintiff saith, that by reason of the premises the defendant still doth detain in his hands the said change, and that he has had no fair set-off or satisfaction of the said accounts, and that he has been and still is ready, on a fair scrutiny of Mrs. Brind's accounts, and after a fair allowance to pay her what may be due to her, pursuant to the directions of the said *Usher &c.*

Surrejoinder, that the said revocation of the said mand, and the said direction by the court in the plea and rejoinder mentioned, was received by the defendant, to wit, on the 1st day of January 1835, and that the said revocation, &c. was had and received by the defendant and the defendant caused the said bill to be ac-

Brind, that he had received the bill for the pur-
 in the said plea mentioned, and that he held the
 for that purpose, and until after the defendant
 d to be informed by the said Mrs. Brind when
 the same should be delivered, and until after
 defendant undertook and promised that such in-
 tion should be attended to, and until after the
 ff paid the expense of conveying the said notice
 the defendant to the said Mrs. Brind, as in the
 plication alleged, concluding to the country. A
 tial demurder. The causes are not material to
 but the following ground of general demurder
 is stated in the margin of the demurder book:
 the surrejoinder is bad in law, because it appears
 pleadings and is admitted by the surrejoinder,
 the defendant is the agent of Usher, and that
 it remains in the defendant's hands the same as in
 's, indorsed but not delivered over to the in-
 Mrs. Brind, and no property in the bill has
 ore passed to her, or vested in her husband in her
 illd. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc.
 the surrejoinder is bad in law, because it appears
 gins for the defendant supported the demurder,
 ended to *Williams v. Everett* (a) [*Parker B.*
 long pleadings are an elaborate denial of the
 ent in the declaration, that the plaintiff was pos-
 of the bill.] The Court called on the plaintiff
 to show to support the surrejoinder. The principle
Williams v. Everett is not applicable, as that case
 off for want of the privity necessary to support
 suit for money had and received; whereas this
 is brought to recover a specific bill itself, which
 been remitted, having been indorsed over in such
 al manner as passed the property in it to the

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 ~~~~~  
 BIND  
 &  
 HAMPSHIRE

(a) 14 East, 582.

[illegible]

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B. No, they must give up the bill to him who  
it it. But the defendant gave notice to Mrs.  
that he had received the bill, and was ready  
it for her account. Then the authority was  
irrevocable on that ground as well as the other,  
was given for good consideration, viz. a bill  
Mrs. Brind.

ABINGER C. B. This case appears to me to be  
is if *Usher*, the payee, having first indorsed the  
the plaintiff, had himself carried to the drawee  
acceptance, and I am of opinion, that it could not  
not have subjected him to an action on the bill,  
can it be sustained against the present de-  
fendant. Nothing shows that the defendant had  
any new relation with the plaintiff, but to  
the character of nature of the original agency  
it. It is the same case as if *Usher* had indorsed  
the indorsee by the hands of the defendant, who,  
of performing his duty, brought the bill to  
might then have demanded it against the bank.

It had have been said, "the bill was not  
the right of property in the bill is not changed,  
the agent has not done precisely what he was  
by his principal to do." [The court said, "The  
the drawer's hand-writing, and not that of an  
agent."]

B. Nothing in this case shows that the pro-  
in the bill was transferred from *Usher* to the  
defendant. For even supposing that the defendant's  
to Mrs. Brind could be considered as an assign-  
ment, it would not be a bill of exchange for her use,  
it would not have the effect of taking the property in  
of *Usher*, and vesting it in her. When money  
is deposited with an agent, and a direction by  
him to pay it over, by a third person, remains  
payable by him, till it is executed by the

received the bill for the plaintiff's use  
and interest, and the defendant, who  
contracted by the defendant, to hold it  
plaintiff for any new consideration  
the plaintiff to the defendant. Then  
the defendant still held the bill  
agent for [Everett], who for all that  
still liable to the plaintiff for the  
situation of these parties is not altered  
which appears to what may be termed  
tract between the plaintiff and defendant  
latter proposed, that in a certain event  
happened, the bill should be the plain

Defendant B. L. and an opinion  
laid down in *Williams v. Everett* on  
case, though the form of action is  
presentment of this bill for acceptance  
much trouble, did not alter the proper  
any thing else appear sufficient to  
Then the case comes to this question  
thing has been done between the de  
the bill was sent as agent of the  
person for whose use the money was

has not, *Williams v. Everett* is in point against plaintiff. Lord *Ellenborough* states the principle case to be, that the parties to whom the bill is paid may "hold it till received, and its amount received, for the use of the remitter himself, until the engagement entered into by themselves with the person who is the object of the remittance, they excluded themselves from so doing, and have appropriated the remittance to the use of such person. But what has been done here? Though the defendant states his readiness to hold the bill for the plaintiff's use, there is no assent by the plaintiff to receive it in payment of the debt due from him, and the utmost to which it amounts is an offer to the agent to hold the bill for the party on whose behalf the remittance was made, if he should assent to receive it in payment of the debt due from the remitter. Then there is no such "appropriation" of this bill as is described by Lord *Ellenborough* in *Williams v. Everett*. I am of the same opinion.

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Judgment for the defendant.

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Ex parte JAMES PARRY.

An attorney, who, having ceased to practise for some time, has been re-admitted in the court of King's Bench, may be re-admitted in this court without putting up a notice or making the usual affidavit.

**ARCHBOLD** moved for the re-admission of Mr. *Parry* as an attorney of this court. In 1830 he had been admitted an attorney of the court of King's Bench, and in 1831 had been admitted in this court. After practising for some time, he had ceased to take out a certificate. He had recently applied to the court of King's Bench to be re-admitted, which that court had permitted without the payment of any fine, on putting up the usual notice and making the usual affidavit. The question was, whether he must put up a notice and make an affidavit in this court. This is not so strong a case as *Ex parte Yeates (a)*. There an attorney, who had been struck off the roll of the court of King's Bench for misconduct, was struck off that of the Common Pleas, on reading the rule for striking him off the roll in the King's Bench. His innocence of the alleged misconduct being afterwards shown to the satisfaction of the judges of the King's Bench, he was re-admitted there, and the court of Common Pleas also re-admitted him without the payment of any arrears of duty or fine.

**PARKE B.**—You apply for your client to be re-admitted here, simply because he is regularly an attorney of another court.

*Per Curiam.*—Let the rule be absolute for his re-admission.

Rule absolute.

(a) 2 Moo. & Sc. 618; 1 Dowl. P. C. 724.

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INGLE *against* BELL.

RESPASS for assault and false imprisonment.

Plea: as to the assault and giving the plaintiff in charge to a certain policeman, and forcing and compelling him to go in custody of the said policeman through the streets to a certain house, and there imprisoning and keeping and detaining him in prison, as he said declaration mentioned; that the defendant lawfully possessed of a certain messuage or public-house situate at &c., in which he inhabited, dwelt, and carried on business, and the defendant being so possessed thereof, the plaintiff, just before the said time at &c., with force and arms and with a strong hand, attempted and endeavour forcibly to break into and enter the said messuage or public-house of the defendant without the leave and licence and against the will of the defendant; whereupon the defendant at the time when &c., being in the said messuage or public-house, in order to preserve the peaceable and quiet possession thereof, did resist and oppose such entrance of the plaintiff into his said messuage or public-house, and in so doing, and because the plaintiff behaved himself violently and created a disturbance in the street, by which means a mob was assembled and the defendant's business interrupted, and his customers annoyed, and because the plaintiff threatened to continue and persevere in such violent conduct

and his attempts and efforts to get into the house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his attempts and efforts was complied with, the defendant, in order to preserve the peace and to secure himself from a renewal of such attempts and efforts, gave the plaintiff in charge to a constable to be carried before a justice, who discharged him. The plea was held good after verdict, for it must have been supported at the trial by proof that there was danger of a renewal of the breach of the peace originally committed in attempting to break into the house.

In trespass for assault and false imprisonment, the defendant pleaded that the plaintiff attempted forcibly to break and enter the messuage or public-house of the defendant without his leave, whereupon the defendant resisted such entrance, and because the plaintiff behaved himself violently and created a disturbance in the street, by which means a mob was assembled, and the defendant's business interrupted, and his customers annoyed, and because the plaintiff threatened to continue such violent conduct, and to

house, to give the plaintiff in charge to then being a constable and peace officer plaintiff into custody and safely he could be carried and conveyed, and convey him before some justice of the peace named by and before him touching to to be further dealt with according to that occasion the said *W. Sexton*, so constable and peace officer as aforesaid of the defendant, did take the plaintiff and as soon as conveniently could be, the plaintiff was carried and conveyed to *Roe*, a justice of peace, who examined him. Verification. Replication, *de iure*

At the trial before Lord Abinger at the *Exchequer* sittings after last *Michaelmas* term the plaintiff's complaint was proved by the defendant had a verdict. *Platt* after rule to show cause why judgment should not be entered up for the plaintiff *non obstante*

*Wordsworth* showed cause. The plaintiff's justification, for it shows that the plaintiff was forced to enter the defendant's house in disturbance in the street, by which the plaintiff was disturbed, and that because the plaintiff



order to preserve the peace, to give the plaintiff in charge to a constable. *Timothy v. Simpson* (a) is in point.

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*Platt and Barstow* contra. This case differs from that in *Timothy v. Simpson*, where the person given in charge was in the defendant's shop creating a disturbance, and refusing to leave it when requested. Here, the plaintiff was in the street, and does not appear to have been guilty of any breach of the peace at the time he was given in charge; and if he had been so guilty on any previous occasion it is clear that it had ended, for the plea states the plaintiff to have threatened to continue his violent conduct. The disturbing of the defendant's customers, and the mere apprehension of the plaintiff's executing his threat, are not sufficient to justify giving him in charge. Even had the constable heard the plaintiff's threats to renew the affray, he could not have taken him after the breach of the peace had ended. [*Parke* B. The plea does not show that the breach of the peace had ceased, but the contrary. Danger of a renewal of the breach of the peace being renewed, must have been shown at the trial in order to maintain the plea. *Alderson* B. Threats may be by gestures as well as words (b).] The original breach of the peace, viz. the plaintiff's attempt to break into the house, had ended; he then, while in the street, threatened to renew that attempt. [*Parke* B. To maintain this plea, the defendant must have shown that the breach of the peace was not completely over, and that at the time the plaintiff was taken into custody he was on the spot, and that there

(a) 5 Tyr. 244.

(b) Show of force (without actual assault) has been held sufficient to constitute forcible entry, *Milner v. Maclean*, 2 C. & P. 17; *Rex v. Smyth*, 2 C. & P. 201.

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was then danger of a renewal of his violence, and that proof would be sufficient. These points being part of the cause of imprisonment, were material, and put in issue by the replication *de injuriâ*, and all the intendment which we can make after verdict is, that all the material facts are proved. The plea is tantamount to averring, that it being necessary to give the plaintiff into the custody of a police officer, in order to prevent a breach of the peace, the defendant did so.] The justice could not bind the plaintiff over to keep the peace, for merely threatening to break open the house. No affray, riot, or forcible entry are shown by the plea. The justice's authority in cases of forcible entry, is found in 2 *Burn's Justice*, tit. *Forcible Entry*, and shows, that to found it a complete forcible entry is first requisite, and, secondly, a complaint before the justice.

LORD ABINGER C. B.—The plea alleges facts so nearly amounting to a riot, that I think it a sufficient justification after verdict. There must be a remedy against a man who attempts to break into a house, and by so doing gathers a mob at the door, to the disturbance and annoyance of the inmates.

PARKE B.—The plea is at all events good after verdict. Indeed, were it necessary, I should say it sets forth enough to show an unlawful assembly.

ALDERSON B.—The word 'mob' in the plea excludes all inference founded on there being but one person on the spot.

Rule discharged.

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the matter of the estreated Recognizance of PETER MORRIS of *Swansea*, Master Mariner.

**N. ROGERS** moved to discharge the recognizance, defendant stating that notice of the motion had been given to the solicitor for the corporation of the city of *London*, to whom the recognizances were estreated, having been forfeited within the city, being.

Notice of a motion to discharge an estreated recognizance should be given to the attorney-general, whether the estreat in question has been in fact granted out by the crown by charter or not.

Lord ABINGER C. B.—*Primâ facie* these estreats belong to the crown, and we cannot take judicial notice that they are granted to the corporation mentioned. If they are vested in them by charter, the fact must be admitted by the crown before we can discharge the recognizances. You should serve the attorney-general with a notice of your motion, and if he does not appear, the writ may be granted absolutely.—This having been done, and the attorney-general not objecting, the motion ultimately prevailed.

### WILLIAMS *against* HOSIER.

**ANSEL** moved for a *distringas*. The Court (Lord Abinger C. B., Parke B., Bolland and Coleridge Js.) postponed the granting the writ, in the absence of an affidavit to show that the defendant was actually at home or in the neighbourhood, at the time the calls were made (*a*).

A *distringas* will not be granted if it does not sufficiently appear that the defendant was at home or in the neighbourhood at the time the calls were made.

<sup>a</sup> See *Winstanley v. Edge*, 1 Tyr. 279; *Godkin v. Redgate*, Id. 289; *Winstanley v. Bower*, 2 Dowl. P. C. 1; *Anon.* 1 Tyr. R. 499; *Anon.* 8 Taunt. 164; *Fisher v. Goodwin*, 2 Tyr. 164; *Anon.* 2 Tyr. 165.

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BAYLEY *against* RIMMELL.

The plaintiff served the defendant as an assistant-surgeon for 161 days, when falling ill he went to a hospital for three months, and on his leaving it neither returned to the service nor was requested by defendant to do so. No specific contract of hiring appeared. Payments had been made to the plaintiff on account of wages during his service, but were of various amounts, without reference to any distinct periods of a year, or to any fixed compensation payable at the end of it. Held, that if there was any evidence of a hiring, it did not amount to a general hiring, and consequently of a hiring for a year, but that it showed a

**A**SSUMPSIT for wages, by an assistant-surgeon against his master. Pleas: first, the general issue; secondly, payment of money into court. The following facts appeared at the trial before *Gurney* B. at the *London* sittings after last term. The particulars of demand claimed salary for 161 days, at the rate of 200*l.* per annum. Evidence was given that the plaintiff had served the defendant for that period, and that he had received different sums from the defendant at various indefinite periods. No express contract of hiring appeared. After the 161 days had elapsed, the plaintiff being ill, went to a hospital and remained there three months, but did not return to the plaintiff's employ, nor was requested to do so. For the defendant it was said, that upon this evidence a general hiring, which was in law a hiring for a year, must be presumed, so that the plaintiff could recover no wages for want of completing the year's service (*a*). The learned baron doubted whether there was evidence of a hiring for a year, and held, that if there was, the rule against apportioning wages in respect of time did not prevent the plaintiff from recovering rateably for the period of his service, as the complete performance of the contract was prevented by the act of God. Verdict for the plaintiff on both issues with 59*l.* 16*s.* damages on the first plea.

*Theobald* moved for a new trial. Unless the year's service was performed, or the dismissal was improper,

(*a*) See the note to *Noulan v. Ablett*, 5 Tyr. 714.

contract to pay such wages for the plaintiff's services as they should be worth, and that the plaintiff was entitled to recover accordingly *pro rata*.

the plaintiff cannot recover; *Countess of Plymouth v. Brogmorton* (a). He also cited *Thomas v. Williams* (b), *Leeston v. Collyer* (c), *Ridgway v. Hungerford Market Company* (d), and *Turner v. Robinson* (e).

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LORD ABINGER C. B.—There was no evidence of any hiring at all, but of service only. Then the jury were at liberty to infer that the contract between the parties was for payment to the plaintiff of such a sum as his services should be worth. That has been done, and I think rightly.

PARKE B.—I agree that proof of a general hiring, without further evidence, must be taken to establish a hiring for a year; but even supposing that there was in this case general evidence of a hiring, the evidence abundantly shows that there was no hiring for a year. The payments which were made from time to time were of various sums, without being proved to have been on account of any fractional parts of the year, or of any specific salary or compensation which was to be paid at the end of it. The plaintiff's illness separated him from the defendant; but on his recovery he neither returned to the service nor was requested to do so in order to complete it. My lord chief baron was never requested to ask the jury, whether or not there was a yearly hiring. Probably that was thought unnecessary or useless on this evidence.

The other barons concurred.

Rule refused, but a rule was granted
to reduce the damages.

(a) In Error, 1 Salk. 65; S. C. 3 Mod. 153.

(b) 1 Adol. & Ell. 685.

(c) 4 Bing. 309.

(d) 3 Adol. & Ell. 171.

(e) 5 Bar. & Adol. 789.

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LANGLEY *against* the Earl of OXFORD.


Action on a money bond. Plea, *non est factum*. A judge ordered the venue to be changed, making it one of the terms of his order that the defendant should admit the handwriting of the attesting witness "on the trial of the cause" in case he should not then be found. The plaintiff had a verdict at the trial, which was set aside with leave to defendant to amend the oyer, by setting forth the condition more fully. The bond and condition being set out on oyer, the defendant pleaded specially, alleging that the condition had been altered since the bond was executed. Held, that the admission consented to for the purposes of the first trial was also evidence for the plaintiff at the second trial, no alteration having been made in the issues as far as concerned the admission.

DEBT on bond in the penal sum of 1300*l*. The bond and condition were set out on oyer, by which it appeared that the bond was given for payment of 650*l*., "with interest for the same after the rate of 5*l* for each hundred pounds by the year." The plea was, that the words between inverted commas respecting the interest, had been inserted in the condition after the execution of the bond. Replication, that they had not. At the trial before Lord Abinger C. B. at the sittings at *Westminster* after last *Hilary* term, the bond was produced by the plaintiff. Its execution appeared to be attested by a subscribing witness, who did not appear; but it was proved, to the satisfaction of the chief baron, that search sufficient to excuse his being produced, had been vainly made after him. Nor was his handwriting proved, but the plaintiff relied on a baron's order dated 10th *February* 1835, for changing the venue from *Carmarthenshire* to *Middlesex* by consent of parties, the defendant thereby undertaking to admit on the trial of the cause that the attestation was in the handwriting of the witness, in case he could not be found. Since that order the plaintiff obtained a verdict in this cause, the plea being *non est factum* only, without setting out the words in question on oyer. That verdict was set aside in *Trinity* term 1835, and a new trial ordered, on payment of costs by the plaintiff, and giving him leave to amend his declaration. The defendant thereupon amended his plea, by setting out on oyer the words respecting the interest. For the defendant it was urged, that the baron's order only applied to the evi-

ence to be adduced at the original trial, and that the handwriting of the attesting witness was, therefore, necessary to be proved. The learned chief baron admitted the bond in evidence, but gave leave to move to enter a nonsuit on the point. The bond produced was in the common printed form of a money bond, and the words "with interest for the same after the rate of 5*l.* for each hundred pounds by the year," had been written in the blank space usually left in printed forms. A line however had been drawn along the form, either before or after the words were written, but neither plaintiff nor defendant proved the state of the bond at the time it was executed. It was left to the jury, by the chief baron, to say, whether, in the absence of all other evidence than the above, the circumstance of the line running through the words raised such a suspicion in their minds as to make it necessary for the plaintiff to explain how it came there. The jury answered, that the appearance of the bond did not justify any suspicion that it had been altered after its execution, and added, that the small size of the writing in which the words respecting the interest were added, and which was in the same handwriting with the written part which preceded, (*viz.* the plaintiff's) had convinced them that they were inserted before the execution. Verdict for the plaintiff.

Sir William Follett now moved to enter a nonsuit. The baron's order for admitting the handwriting of the attesting witness, if he could not be found, was no longer in force against the common rule of evidence at the second trial. It only applied to the first trial, since which the pleadings have been amended and the issues altered. That fact distinguishes this case from those of *Elton v. Larking* (a), and *Doe d.*

(a) 1 M. & Rob. 196; S. C. 5 C. & P. 386.

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Wetherell v. Bird (a), where written admissions made for the purpose of a former trial, were used on a new trial. This is in fact a new record. Nor had any inquiry been made after the witness since the first trial in *Easter* term 1835, except one at the *Blenheim* hotel, to which the answer was, that he had been there, though they did not know where he was then.

Per Curiam.—[Lord Abinger C. B., *Parke*, *Bolland* and *Gurney* Bs.]—There has been no alteration on this record of the issue, at least as far as respects the admission in question. The admission is the same as if it had been made without a judge's order; it was always to be an admission at the trial of the cause, whenever it should take place, no matter whether on a first or second occasion. *Parke* B. added, that he apprehended that all the facts stated in the special plea might have been given in evidence on *non est factum* at the first trial, and that the search after the witness was sufficiently proved.

Rule refused.

(a) 7 C. & P. N.P.C. 6; cor. Lord Denman C. J.

LYON *against* TOMKIES, PITT, and STANDAGE.

By 2 W. & M.
sess. 1. c. 5.
s. 2., the over-
plus produce

CASE. The first count was for an excessive distress for arrears of rent. The second, for dis-

of sale of a distress, is directed to be left in the hands of the sheriff, &c. for the owner's use. By *overplus*, is intended what remains after payment of the rent and reasonable charges, so that their reasonableness may be disputed in an action on the case for not leaving the overplus in the hands of the sheriff, &c.

Verdict, that payment by a broker to the plaintiff's authorized agent, of the balance remaining after paying the rent and the whole of his charges, is equivalent to paying it to the sheriff, &c. for his use, according to the statute; but where it was pleaded that the balance was so paid by the broker, and accepted by the plaintiff in full satisfaction of the plaintiff's cause of action for not leaving the overplus with the

ning and selling more goods than were sufficient to satisfy such arrears and the charges of the distress. The third was for selling the distress for an insufficient price. The fourth was on stat. 2 *W. & M.* sess. 5. c. 2. for not leaving the overplus of the produce, or paying the arrears of rent and charges of distress, in the hands of the sheriff of *Middlesex*, or his under-sheriff, or of the constable of the parish, hundred, or town wherein the distress was taken, for the use of the plaintiff so being the owner of the goods as aforesaid, though a reasonable time for that purpose had long since elapsed.

Verdicts by *Tomkies* and *Pitt*: first, not guilty; secondly, to the first and second counts, leave and pass; thirdly, to the fourth count, that after the satisfaction of the arrears of rent and charges, and from the commencement of the suit, the defendants paid to the plaintiff the overplus and every part thereof in full satisfaction and discharge of the cause of action on that count mentioned, and all damages sustained by the plaintiff in respect thereof, and which the plaintiff accepted and received in full satisfaction thereof.

Application to the plea of licence, *de injuriâ*; and to the first plea, that the defendant never paid and the plaintiff never received the overplus in satisfaction of the cause of action.

Verdicts, separately pleaded by *Standage*: first, not guilty; secondly, that the produce of the sale was not more than sufficient to satisfy the arrears of rent, and

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It was held, that the payment to and receipt by the plaintiff's agent of the balance, without disputing the amount of the charges, were facts upon which that could not be laid down as law, without leaving it to the jury to say whether the plaintiff did accept such balance in satisfaction, and if not, whether the amount was sufficient to cover the real overplus due, after deducting the rent and real charges of distress.

Where a plaintiff proceeds against more than one defendant on a count on which it is out that only one defendant can be liable, held, that he is bound to elect the defendant against whom he will proceed, as soon as he has closed his own evidence.

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the charges of the distress. The replication took issue on both pleas.

The cause was tried before Lord *Abinger* C. B. at the *London* sittings after last *Michaelmas* term, when the following facts were proved. The plaintiff being in arrear for half a year's rent of her residence, her landlord instructed the defendant *Pitt*, a broker, to distrain her goods. The defendant *Tomkies*, *Pitt*'s clerk, having distrained by his master's order, the goods were taken to the premises of the defendant *Standage*, an auctioneer, and there sold by him for 59*l*. The rent in arrear was 35*l*. But evidence was given for the defendants, that the plaintiff's son, who managed her business, and whose authority to act for his mother and to receive the overplus appeared, desired that every thing on the premises might be sold, in order to avoid an expected extent of the crown, and that he attended the sale and bought in goods for his mother. After the sale *Pitt* being applied to by the son for an account of the proceeds, paid him 6*s*. 3*d*. as the balance remaining due, after paying the rent and charges. The son made no objection to the charges at the time, and gave a receipt. But many of the charges were now objected to as excessive. The lord chief baron being of opinion that as *Standage* had no share in making the distress, this action would not lie against him jointly with the other defendants, he was acquitted. The plaintiff then called witnesses to prove his case, after which the defendants' counsel contended that there was no case to go to the jury against *Pitt* and *Tomkies*, at least on the fourth count, and that the plaintiff should elect the count on which she would rely. The chief baron denied that the plaintiff was bound to elect the count on which she would rely; but ruled, that as both *Pitt* and *Tomkies* could not be liable on the fourth count, she must

elect against which of them she would further proceed. She then elected to go on against *Pitt*, and *Tomkies* was thereupon acquitted.

In summing up, the chief baron left it to the jury to say, first, whether the plaintiff's son was her agent; next, if he was, whether all the goods had been sold by her or his consent, and whether the sale had been properly conducted. The jury found all three questions in the affirmative. On the fourth count the chief baron laid it down, that the statute did not apply to a case where the party distrained or received the overplus from the distrainor, which the plaintiff had here done by the hands of her agent; and directed a verdict for the defendant on that issue. The jury gave a verdict for the defendant on all the issues.

In last *Hilary* term, *Humfrey* moved for a new trial, on the ground of misdirection. He first contended, that the plaintiff was not bound to elect against what defendant she would go, till the whole case was closed on both sides; and secondly, that the payment to the plaintiff was not such a payment as complied with the statute, and that it should have been left to the jury, whether it amounted to a payment in satisfaction of the cause of action. The court refused the rule on the first ground, saying, the plaintiff was bound to elect at the close of her own evidence; and intimated that the fact of the propriety of the charges having been decided on by the jury, afforded no ground for a new trial; but granted him a rule on the second point.

In this term the rule came on for argument, and

Lord ABINGER C. B., after reading his notes of the evidence, added,—This question depends on the construction of 2 *W. & M.* sess. 1. c. 5. s. 2., which has been followed by 11 *G.* 2. c. 19. s. 19., an act which, after reciting the hardship resulting from the law making

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distrainers trespassers *ab initio*, by reason of any irregularity in the distress, provides, that the party aggrieved by the irregularity shall recover satisfaction for the special damage he shall have sustained, and no more, in an action of trespass on the case. On the abstract point, whether the non-payment of the overplus to the sheriff or constable to the plaintiff's use, was any damage to the plaintiff, I should have thought that proof of a payment to her agent, would have taken away that ground of action. *Walter v. Rumbal*(a) seems to me analogous. The same section of the act provides, that notice of the distress taken shall be left at the chief mansion-house &c. of the distrainee; the notice of distress, however, was given to the plaintiff himself, and that was held to be no special damage. There, though service of that notice was a matter preliminary to the sale and a condition precedent to it, the court thought that by delivering it to the plaintiff himself, the intent of the statute had been substantially complied with, though it was not left at the most notorious place on the premises. Here, the payment of the overplus is a matter subsequent to the sale: and it appeared to me, that as it got into the hands of the plaintiff for whose use only it was directed by the statute to be left with the sheriff or constable, the act was substantially satisfied. I was, therefore, of opinion that she could not maintain the action, unless she had stated in the declaration and proved accordingly a special damage resulting to her from its not having been paid according to the statute, *e.g.* earlier. But in this case it appeared that the payment was made on the day the goods were cleared, which could not be done till the son produced his authority to receive the surplus. The question, whe-

(a) 1 Ld. Raym. 53.

ther the overplus paid over was sufficient, did not appear to me to arise on these pleadings, because the fourth count was only for non-payment of the overplus, and if the plaintiff relied on showing that it should have been larger, and that the broker had made improper deductions, notice should have been given by her to the defendant, so as to afford him an opportunity to tender amends according to s. 20 of 11 G. 2. c. 19., when she might have sued him by special action on the case, or for money had and received. As to the issue, whether or not the balance of 6s. 3d. was paid and accepted in satisfaction of the cause of action, the jury, had it been left to them, might perhaps have thought that it was not; but all I asked them on the subject was, whether they thought the plaintiff's son was her agent to receive the overplus, and on their finding in the affirmative, I took on myself to decide as matter of law that she was not entitled to recover on that count.

Platt and *Barstow* showed cause. For the purposes of argument, the fourth count may be taken to be the only one in the declaration, *Pitt* as the only defendant, and not guilty as the only plea. [*Parke* and *Alderson* Bs. assented, adding, that no other plea was supported, the jury not having found that the plaintiff had accepted the 6s. 3d. in satisfaction of the cause of action.] The fourth count admits the correctness of the amount retained for rent and expenses, also, that the surplus produced by the sale was paid to the plaintiff's son by her authority, but complains that it was not left in the hands of the plaintiff's statutory agent, the sheriff or constable, and that it was unsatisfied to the plaintiff and converted to the defendants' use. Even assuming that the allegations of the count, which are negatived by the evidence, were

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the charges.] That though the reasons were only so much, yet the defendants bursed and retained a certain unreasonable [Parke B. Does not the "overplus after of the rent and charges," mean the residue of the rent and the *reasonable* claim allegation as to the charges, must in taken to refer to the sums actually paid, their amount be disputed on this count. has not specified any sum as reasonable alleged that the defendants did not pay over which would then have remained. [Lord The plaintiff having received the over objection, or giving notice afterwards, whether she has not adopted the account complaint been, not that the overplus was that the charges were unreasonable, she cial action on the case have been brought I remember no such count, and think this includes every thing beyond *reasonable* count might allege that the defendant received a sum of money and detained a great part of it in payment of charges which were unreasonable. Would the receipt for the overplus be more than strong evidence for

er step, as giving notice, &c. she can sup-
action—sect. 19 of 11 G. 2. c. 19. would be
[*Parke B.* The words of that clause are,
plaintiff shall recover full satisfaction for the
amage he shall have sustained thereby, and no
does not that apply only to cases of irregula-
ch would have made the defendants tres-
ab initio before that enactment? Does it
a state of facts which requires a new remedy
on the equity of 2 W. & M. sess. 1. c. 5. s. 2.,
right to receive the overplus?] It is sub-
at the omission to comply with a single act
quisite by the statute of *Will. & Mary*, makes
y a trespasser *ab initio*, notwithstanding stat.

But this question does not arise, for the
was bound to prove an overplus arising from
eeds of those goods which were sold to pay
due. A smaller part of the goods would have
for this object; but as the plaintiff requested
ead of selling only that part, the whole should
it does not appear that any overplus whatever
fter the sale of the articles which were neces-
ld to pay the rent. Then there was no case
the jury on the fourth count.


Grey and *Ball* supported the rule. The last
is not raised at the trial. If it had, it should
en left to the jury to say, from which portion
oods the overplus arose; which was not done.
material point is, that the jury were not called
ecide on the issue raised on the fourth plea,
the plaintiff accepted the balance “in satis-
of the cause of action” stated in the fourth
Her arrangement with the landlord for selling
le of the goods which had been seized, did
ve her right to sue for that wrongful disposal

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of goods were mixed up and sold in order, the auctioneer became her agent to count to her in an action for money had and received. Not till the jury found that an overplus had been put on that account. The right to set aside the sale after the lapse of a reasonable time [Lord Abinger C. B. As the payment was made immediately on ascertaining the authority of the plaintiff's agent, no question could arise as to the lapse of time.] At all events, it is open to the jury to dispute the reasonableness of the defence upon the count which alleges a non-payment of a proper overplus. *Hills v. Street* (b) is a tenant's agreement with a broker to sell land in consideration of forbearance to sell elsewhere, not to prevent the tenant from recovering his charges, as money had and received to the plaintiff. *Abinger C. B.* I doubt whether you can raise the question, whether the charges are reasonable or not, for if that was in issue the jury should find for the defendant. *Parke B.* Another jury would have found for the plaintiff's acceptance of the 6s. 3d. that she was satisfied with that amount. A *stet processus* was then issued, being refused, the opinion of the court was delivered in *Trinity* term by

Lord ABINGER C. B.—A new trial will be granted if a *nolle prosequi* is entered against *Tomkies* and *Standage*. My brothers think that the evidence on the fourth count ought to have been left to the jury, and I incline to that opinion. The question will be, whether the plaintiff received the balance in satisfaction, and if not, whether it was sufficient to satisfy the real overplus. Every count in the declaration will be open to the plaintiff.

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Per Curiam.

Rule absolute on those terms.

TURNER *against* ALLDAY.

CASE for illegal distress. At the trial before Lord Abinger C. B. at the last *Warwick* assizes, the question was, whether the agreement for renting the demised premises was for a yearly or quarterly payment of rent? A written agreement was produced, by which the plaintiff agreed to rent the premises at 29*l.* per annum, but no time at which it was to be paid was specified. The defendant, after the plaintiff had signed the agreement, asked him how he would like to pay his rent, to which the other replied "quarterly." Quarterly payments of rent were proved. It was contended for the defendant, that this bound the plaintiff to a quarterly, and not a yearly payment of rent, and that the distress complained of, which was for a quarter's rent, was therefore legal. Lord Abinger C. B. said, that the plaintiff's reply only amounted to this: "I am bound to pay rent yearly, but should rather prefer to pay it quarterly," so that the original agreement had been agreed on between the parties.

After a tenant had signed a written agreement, not under seal, for hiring premises at an annual rent, he was asked by the landlord how he would like to pay his rent, and replied quarterly. Quarterly payments of rent were proved. The landlord having distrained for a quarter's rent, the distress was held illegal, as the original taking was not altered, and no new terms of

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ment was untouched. Verdict for the plaintiff for 15*d.* *Humfrey* now moved to set aside the verdict, and for a new trial on the above facts, contending that the parties had substituted the latter agreement for the former, citing *Cuff v. Penn (a)*.

LORD ABINGER C. B.—The question is, whether there is evidence of any agreement subsequent to the original one? Now, there is no new reservation of rent, and the new agreement is without consideration.

PARKE B.—Nothing but an actually new agreement between the parties, so intended and carried into effect as to operate as a fresh demise on different terms of letting, puts an end to the original one.

The other barons concurring, the rule was

Refused.

(a) 1 M. & S. 21.

BOLD *against* RAYNER.

In an action for not accepting oil bought by the defend-

THIS was an action of *assumpsit* against the defendant, for not accepting 100 tons of palm oil, bought by the plaintiff, the defendant relied on the variances between the following bought and sold notes. The bought note addressed to the defendant ran thus: "We have this day bought for your use from *B.* (the plaintiff) 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash, at 14 days from delivery, less 2½ per cent. discount. The above oil to be delivered from the *Speedy* 'or' *Charlotte*, expected to arrive about *November* or *December* next." The sold note addressed to the plaintiff stated as follows: "We have this day sold for your use, payment in 14 days by cash, less 2½ per cent. discount from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, ex *Speedy* 'and' *Charlotte* to arrive." Held, that the apparent variances between these notes might be explained by evidence of the mercantile usage respecting them, and that it being shown that by such usage the buyer was bound to take the oil from either ship, whenever she arrived, and that the words "expected to arrive" were mere representation, and not part of the contract, the variances were immaterial, and did not rescind it.

him from the plaintiff, and was tried before *Parke B.* the last assizes for *Lancashire*, held at *Liverpool*. The contract in question was made in *September 1833*, by brokers at *Liverpool*, who gave the following bought and sold notes.

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Mr. J. B. Rayner.

SIR,—We have this day bought for your account from *J. P. Bold*, 100 tons dry palm oil, at 31*l.* 10*s.* per ton. Also from the same party 100 tons ditto for Messrs. *Judson* and *Wilson*, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances and a fair proportion of breakers to be taken at an allowance of 24 per cent. payment in cash, in 14 days from the delivery of the oil, less 2½ per cent. discount. The above-mentioned oil to be delivered by the sellers from the *Speedy* “or” *Charlotte* expected to arrive here about *November* or *December* next, and should the said vessel be lost this contract to be void.

(Signed) *Roscoe* and *Regg* (the brokers.)

The sold note was as follows :

Mr. J. P. Bold.

SIR,—We have this day sold for your account to Messrs. *Judson* and *Wilson*, payment in fourteen days by cash, less 2½ per cent. discount from delivery, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton. Also to Mr. *J. B. Rayner*, payment as above, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton, “ex” *Speedy* “and” *Charlotte* to arrive.

(Signed) *Roscoe* and *Regg*.

N.B. A proportion of breakers to be taken at an allowance of 24 per cent.

The price of palm oil fell in *Liverpool* between *December 1833*, and *May 1834*, when the *Charlotte* arrived; the *Speedy* was lost. A *Liverpool* broker proved the usage of that port to be, that unless matter to the contrary is expressed in the contract, palm oil is delivered from the quay at the landing weights with deduction of certain settled allowances. And that if more vessels than one are named in the contract, it may, if in good condition, be delivered from all or

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either, at the seller's option. He also deposed, that by the custom, if a vessel is *warranted* to arrive by a given time with a cargo of oil, the buyer is not bound to take it unless she arrives within the time warranted; but that if one or more vessels are only stated in the contract as *expected* to arrive at a given time or times, the buyer is bound to take the oil whenever she does ultimately arrive. *Alexander*, for the defendant, contended that there were material variances between the bought and sold notes, which it was not competent for the plaintiff to explain by evidence of mercantile usage. The learned baron was of opinion, that the objection ought not to prevail, but gave leave to move to enter a nonsuit. The jury found, that according to the custom of merchants there was no substantial variance between the bought and sold notes, and the plaintiff had a verdict for \$367.

Alexander now moved to enter a nonsuit. The question is, Whether there has been such a variance between the bought and sold notes as will vitiate the contract? For if such a material variance exists, the plaintiff cannot recover against the defendant for not completing the contract by accepting the oil; *Thornton v. Kempster* (a). Now, first, the sold note states the oil as sold to be delivered “Ex *Speedy* and *Charlotte* to arrive.” That applies to oil to be delivered from those ships, so that if they did not arrive, or arrived without oil on board, there would be no subject-matter of the contract. But the bought note contains a complete contract for delivering a certain quantity of oil, which might be demanded from the plaintiff from whatever source he might derive it. The latter part of the clause, “that the above-mentioned oil is to be

(a) 5 T. R. 785. S. C. 1 Marsh. 335.

delivered from the *Speedy* or *Charlotte*, expected to arrive, &c." only points out the ship from which the goods are expected, and does not control the previous clause, which contains a complete contract. [Lord Abinger C. B. The whole contract must be taken together. The second contract is for delivery by the sellers from the *Speedy* or *Charlotte* respectively to arrive, so that if neither arrived, the buyer would not be bound.] Suppose the bought note to be the only evidence existing between the parties, a contract would be established by which the seller must supply the oil, whether it were to be delivered from his ship lying in the river or from his warehouse. [Lord Abinger C. B. Taking the whole together, it appears to have been a contract for oil now afloat, and expected to arrive by certain vessels named.] Secondly, the bought note states that the oil is "to be delivered by the sellers from the *Speedy* 'or' *Charlotte*." Whereas the sold note specifies it to be "ex *Speedy* 'and' *Charlotte* to arrive." Under the sold note, the buyer would have two ships to take it from, but not under the bought note. [Parke B. The jury thought that the terms of the bought note, oil to be delivered by the sellers from the *Speedy* or *Charlotte*, expected to arrive here about November or December next, meant the same thing as the terms of the sold note, "oil at 31l. 10s. per ton, ex *Speedy* and *Charlotte*." The broker proved, that by the usage the vendor was to have the option to deliver the oil from which ship he pleased. Lord Abinger C. B. If the right you suggest were in the buyer, it would be satisfied by the delivery of only a gallon from the *Charlotte*; and if only one ship arrived the seller might say I cannot deliver till the other comes.] Upon the terms of the sold note both ships must arrive, whereas under the bought note only one need. [Parke B. That is, if you read *and* in the sold

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note strictly, and not *or*, which last was proved to be the construction given by mercantile custom.] Though parol evidence of mercantile usage be in general admissible to explain a mercantile contract, that is not always so. That appears from the judgment of Tindal C. J. in *Whittaker v. Mason* (a), particularly where the words upon which the variances arise are words of common use and meaning, as “about” or “more or less,” *Cross v. Eglin* (b), and have no reference to local usage, by which a “thousand” may be shown to mean twelve hundred, *Smith v. Wilson* (c). [Lord Abinger C. B. It was to be collected from the terms and general meaning of the contract, whether between the parties and in their construction, *and* did not mean *or*.] No time for the vessel’s arrival is fixed by the sold note; whereas by the bought note they are said to be expected to arrive in the *November* or *December* following. That is a material variance, for under the first document the buyer might be binding himself to buy within several years, instead of the two months contemplated by the latter, as the extreme limit of the time within which he was to purchase. On this account the defendant thought it hard to be called on to buy, in *May* 1834, oil which had so much decreased in value since *December* 1833, when its delivery was expected to take place. [*Parke* B. The witness deposed, that the word “expected” was mere representation of the probable time of arrival, and that there was no usage to alter that word to “warranted,” so as to make an arrival by a fixed day part of the contract.]

LORD ABINGER C. B.—I am of opinion that no ground appears for granting a rule. The sold note is shorter

(a) 2 Bing. N. C. 370.

(b) 2 B. & Adol. 106; but see the judgment of the court of *Exchequer* in *Hutton v. Warren*, *ante*, 656; *Powell v. Thornton*, 2 Bing. N. C. 668.

(c) 3 Bar. & Adol. 728.

than the bought note; but if the interpretation of the former is only what the latter would have received, no variance appears. I am also of opinion that the words "expected to arrive," are a mere representation by an authorized agent to the seller, and do not form part of the contract; though if the representation had been false, it would have avoided the contract made on the faith of it.

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PARKE B.—I concur. The only real question is, whether evidence was admissible to prove the mercantile meaning of the terms, which apparently conflicted. I think it is clear that such evidence was admissible to explain the variances between the notes (*a*), and if so no difficulty remained, and the jury were justified in their finding.

BOLLAND B.—The bought note is an expansion of the other, but is substantially the same, showing the meaning of the shorter terms used in the sold note.

Rule refused.

(*a*) And see *ante*, 656; 5 Tyr. 654.

WEST *against* SMITH.

CASE for slander. Declaration stated that the plaintiff was of good name &c. And whereas The first count of a declaration for slander, after averring that the plaintiff was possessed of a barley stack, and had insured the same from fire in a certain insurance society, and that the stack was burnt without the default of the plaintiff, laid the slander as follows: "West (meaning the plaintiff) is as likely a man as any one to set fire to his own barley stack." "A Tom and Jerry shop is to be opened in my (meaning the defendant's) parish, and the sign I (meaning the defendant) shall have painted, is a barley stack on fire with a man in the middle of it," (thereby meaning that the plaintiff had unlawfully, wilfully and feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the statute.) There was a second count on the following words, "West set fire to his own barley stack," with a similar innuendo to that contained in the first count. The declaration concluded by alleging special damage. *Semble*, on demurrer, that the declaration was bad.

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also the plaintiff, before &c., was possessed of a certain stack of corn, to wit, a stack of barley of the goods and chattels of the plaintiff of great value, to wit, 55*l.* 2*s.*, and had for security caused the same to be insured against fire, by a certain insurance society or company, to wit, "The *Norwich* Union Fire Insurance Society," and at the time of the loss hereinafter mentioned, the same was by the said society insured for the plaintiff's benefit against fire: And whereas also on the said &c. the said stack of barley was burnt and consumed by fire, without the default of the plaintiff; whereupon the plaintiff afterwards, to wit, on the &c., became and was entitled to receive, and was paid on that day, the said sum of 55*l.* 2*s.*, as and being the full value of the said stock, by the said society, by virtue of the said insurance: yet the defendant well knowing the premises, but contriving and intending to injure the plaintiff, and to cause it to be believed that the plaintiff had wilfully and feloniously set fire to the said stack, with intent to defraud the said insurance society, contrary to the statute in such case made and provided, heretofore, to wit, on the &c., in a certain discourse which the said defendant then had in the presence and hearing of divers persons, of and concerning the plaintiff, and of and concerning the said fire, falsely and maliciously, in the presence and hearing of such persons, spoke and published of and concerning the said plaintiff, and of and concerning the said fire, these false, scandalous, malicious, and defamatory words following; that is to say, "West (meaning the plaintiff) is as likely a man as any one to set fire to his own barley stack." "A Tom and Jerry shop is to be opened in my (meaning the defendant's) parish, and the sign I (meaning the defendant) shall have painted, is a barley stack on fire with a man in the middle of it," (thereby meaning that the plaintiff had unlawfully, wilfully and

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feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the said statute.) And afterwards, to wit, on the &c., in a certain other discourse which the said defendant then had in the presence and hearing of one *William Gray*, and of divers other good and worthy subjects of this realm, of and concerning the plaintiff, and of and concerning the fire, he the said defendant further contriving and intending as aforesaid, then in the presence and hearing of the said *William Gray* and other the last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said fire, these other false, scandalous, and malicious defamatory words following; (that is to say), “ *West* (meaning the plaintiff) set fire to his own barley stack,” (thereby meaning that the plaintiff had unlawfully, wilfully, and feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the said statute.) By means of the speaking and publishing of which said false, scandalous, malicious and defamatory words by the defendant as aforesaid, he the plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed the said plaintiff to have been and to be a person guilty of the said supposed crime, and have by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with him the said plaintiff, as they were

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before used and accustomed to have and otherwise would have had. And also, in consequence of the said speaking and publishing the said false, scandalous, malicious and defamatory words, the said "*Norwich Union Fire Insurance Society*" afterwards, to wit, on &c., and also on &c., declined and refused and still do refuse to insure certain other farming stock and goods against fire, and by reason of the premises the plaintiff was and is otherwise injured. Demurrer and Joinder.

The points intended to be argued in the behalf of the defendant, in support of the demurrer, were thus stated in the margin of the demurrer book.

That the stacks appear on the declaration to have been the property of the plaintiff, and the words charged to have been used by defendant do not *per se* import any offence or a wilful setting on fire, nor do they refer to any insurance.

That the stacks mentioned in the slanderous words, and the stack in the inducement, are not in the declaration connected together; and the stack in the innuendos referring to the last antecedent, the innuendos are not warranted by the declaration.

That the words are not charged as spoken in relation to the insurance, nor does it appear that the defendant had any knowledge that such insurance existed.

Kelly in support of the demurrer. This is a demurrer to a declaration in slander, averring special damage. [*Parke* B. Which you admit by the demurrer.] If it can be shown that the declaration is bad, notwithstanding the allegation of special damage, such admission will not make it good. If the sense of words cannot be changed by innuendos, the meaning of words imputing felony cannot be changed

so as to support the special damage. The distinction was taken in *Day v. Robinson* in error, in the *Exchequer* chamber (a). That was an action for slander, and the declaration contained an allegation of special damage. [*Parke* B. I do not think that special damage was proved in that case.] It is true, that the jury negatived the special damage at the trial, but when the record was carried into the *Exchequer* chamber, the special damage was indorsed upon it as found, and the plaintiff in error was not at liberty to object. [Lord *Abinger* C. B. There the court awarded a *venire de novo*, because it was not certain that the jury had not given damages on the counts that were bad, as well as upon those which were good.] So here, the special damage alleged is not referred to any particular words, and it is impossible to say to which count it relates. If the case were to go down on a writ of inquiry, as the special damage is admitted by the demurrer, the only question would be as to the amount of such damage. If it can be established that the innuendo is bad and cannot be supported, the case must be treated as if it was after verdict, and the jury had given damages on the whole declaration. *Parke* B. It is sufficient if either count is good in demurrer; may not the defect be cured by afterwards assessing the damages on the good count alone?] The special damage introduces a distinction; by demurring we admit it as to the whole declaration. *Parke* B. Certainly each of the two imputations has been contributing to the special damage.] With respect to the second count, the words alleged to have been spoken by the defendant are merely that *West* set fire to his own barley stack, not saying that it was done "unlawfully and maliciously," which the statute

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(a) 1 Ad. & E. 554.

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of the 7 & 8 *Geo.* 4. c. 30. s. 2. requires the act to be in order to make it felonious. It is clear, that where words are actionable of themselves, an innuendo imputing crime cannot be rejected. Here, the words of themselves would not impute felony. [Lord Abinger C. B. A man may burn his own stack if it is not insured, and he does not injure other persons. It is not alleged here that the defendant knew of the insurance.] The only allegation is, that the conversation was of and concerning the plaintiff and the fire, yet the innuendo is, that the plaintiff set fire to the stack with intent to defraud the insurance company. The declaration should have contained an inducement as to the insurance. *West* might have set fire to his stack for a lawful purpose or for his own pleasure. Here, instead of proving the case at a trial, it is necessary that it should be made out on the record, but there is nothing alleged in the declaration to warrant the innuendo. Even admitting that the words spoken warrant an innuendo of some felonious act, they will not support the charge here imputed of a particular felony. An innuendo must be strictly proved at the trial, a plaintiff being bound to establish the meaning he has given to the words used, and after verdict the court will presume that the jury have given their damages for the offence imputed in the innuendo. [*Parke* B. If the declaration is good in point of law, you admit the plaintiff is entitled to recover, and if either of the counts is good, your demurrer is too large. You must, therefore, show that both counts are bad, and that the special damage is not entirely the result of the words laid.] On a writ of inquiry the judge would have to direct the jury to give damages for the imputation of the offence charged in the innuendo: if a particular meaning is given to words, or a particular offence imputed by an innuendo,

it must be proved in fact; and if an innuendo is not properly supported by an inducement, it vitiates the declaration. The objection could not be taken at the trial, for the judge would be bound to tell the jury the natural meaning of the words. The point urged is, that these words may be actionable in themselves, and if a particular meaning is given to them by the innuendo, and such innuendo is bad from not being properly supported, then the declaration is bad. In *Smith v. Carey* (a), where the words used might be understood to convey a charge either of felony or fraud, Lord *Ellenborough* held, that although the words would be actionable in the latter sense as well as in the former, yet as the declaration contained an innuendo that the defendant meant by them to impute felony to the plaintiff, such innuendo was material, and must be made out in evidence. [*Parke* B. We are now considering whether the counts are good in themselves without the special damage, upon which the point is, whether the words are capable of the meaning imputed to them, without any inducement or colloquium. There are two questions, first, whether the words are actionable in themselves, without any introductory averments; and secondly, if not, whether they are not actionable in consequence of the special damage being admitted.] *Smith v. Carey* shows that the court cannot reject the innuendo as surplusage. This case is the same as if it were a motion in arrest of judgment, and the jury had found the words as charged in the innuendo. Here, there is nothing in the introductory part of the declaration to warrant the meaning thereby given to them; it is not alleged that the defendant knew of the insurance, or that the conversation was of the insurance; there is in fact nothing on the record

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(a) 3 Campb. 461.

meaning given to them without any hold that there is, would be to enlarge of words at the pleasure of the pleader is clearly established, that you cannot mean the meaning of particular words. Here, to defraud a stock may be one thing, and the burning of a house may be another; but to defraud a company is a third case. [*Parke B.* is an authority that you cannot reject an authority that is good and capable of a meaning.] within the principle established by *Smith v. Carey*, that, whether words are in themselves or not, if a particular meaning is imputed to them, the jury must find them with that meaning, not at all. It may be argued, that the particular intent imputed, that the particular intent committed is not immaterial, but it is immaterial that it is; for a jury on a writ of *habeas corpus* for larger damages in the one case than in the other, although when a man is tried for a particular intent with which he committed the offence, it is important where an action is brought for imputing a felony with some particular intent, and posing an action to be brought for an assault, if a man had committed a simple assault and given trifling damages but if the assault

ger C. B. Is there any decision that you cannot reject in innuendo where it may explain the words, but cannot be supported?] Great injustice would ensue in many cases if the law was otherwise. Where words impute a particular felony, the jury must give damages for such imputation. When a motion is made in arrest of judgment, or, which is the same thing, the case is argued in demurrer, is it to be said that the innuendo was rejected, or may now be rejected? It cannot be objected at the trial, that the innuendo is not supported by an introductory averment, for the party should have demurred or must move in arrest of judgment. On a writ of inquiry, how could the judge tell the jury they must reject the innuendo? [Lord Abinger C. B. If the jury could do it, we may do it now.] It is submitted that if the innuendo is bad, the admission of the special damage is no answer. The ground on which words not actionable in themselves may be made so by special damage is, that the action is not an action of slander, but on the case for the malicious act of the party. Suppose in the present case it was contended by a defendant's counsel at nisi prius, that the innuendo was bad in law, and that the jury could only give damages for the special damage alleged, would any judge listen to the objection, and tell the jury to give no damages for the slander, but only for the refusal of the insurance office to effect a new insurance? If the defendant was to withdraw the demurrer without the leave of the court, and go down to trial, and there take the objection, he would be told that he could have raised it by a demurrer; and the jury could be directed to say, whether the words meant what was alleged upon the record. If he were to reply afterwards in arrest of judgment, is he to be told that the jury did not give damages on the innuendo, but only for the special damage? [Parke B.

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You say that if there had been a verdict here, that *Day v. Robinson* would have exactly applied, and that it makes no difference in principle, whether there is one or more counts in the declaration. You say that an innuendo cannot be rejected, although bad in law for not being supported by introductory averments.] It is submitted that both these counts are bad on that ground. [*Parke B.* After verdict the court may say that they cannot understand the words in the meaning ascribed to them by the plaintiff, and therefore cannot give him judgment for the special damage which was proved. That is the effect of *Day v. Robinson*.]

Richards contra, was about to support the declaration.

LORD ABINGER C. B.—Do you not think it worth your while to amend, since the case of *Day v. Robinson*?

PARKE B.—There seems some difficulty in distinguishing this case from *Day v. Robinson*. When your attention is drawn to that authority, it is difficult to get over it. You had better amend.

Leave for the plaintiff to amend
on payment of costs.

DANIELS *against* MAY.

“A. B. clerk of C. D. the defendant’s attorney,” is not a sufficient description of a deponent in an affidavit.

BARSTOW showed cause against a rule nisi which had been obtained by *Steer* to set aside an interlocutory judgment for irregularity, and took a preliminary objection to the affidavit upon which the rule had been obtained, on the ground that the deponent’s place of abode was not stated as prescribed by the

Reg. Gen. Hil. T. 2 Will. 4. s. 5., which requires that "the addition of every person making an affidavit shall be inserted therein." The present affidavit commenced as follows: "*A. B.* clerk to *C. D.* the defendant's attorney, maketh oath &c."

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Steer contra, contended that the affidavit was sufficient, the object of the rule being merely to afford the opposite party the means of knowing where to find a deponent.

Lord ABINGER C. B.—This affidavit is insufficient; we must adhere to the rules.

Rule discharged.

MILLS *against* JOSEPH BARBER.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, drawn by one *Samuel Barber*, payable two months after date to the order of the drawer, and by him indorsed to the plaintiff. **Plea:** that the defendant accepted the bill at the request and for the accommodation of the said *Samuel Barber*, and that the said *S. Barber* did not give, nor did he the defendant have or receive any value or consideration for his the defendant's accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration. **Replication,** that the drawer indorsed the bill to the plaintiff for good and valuable consideration. **Held,** that the whole admission by the plaintiff on the pleadings being that the bill was in its inception an accommodation bill, for accepting which by the defendant the drawer gave him no consideration, the onus of proof in the first instance rested on the defendant; but that in cases in which the holder's title to the bill is shown to be connected with some fraud, *e.g.* illegal taking, loss or larceny &c., the holder is bound to begin and prove in the first instance that he gave value for the bill sued on.

issue thereon.

At the trial before *Alderson B.* sittings in *Hilary* term last, a question upon the above pleadings the onus lay to prove that he gave consideration whether the defendant was bound of consideration. The learned judge onus lay on the defendant to prove consideration, and on his not being prepared the learned baron directed a verdict to be given for the plaintiff. *Humfrey* in the same term nisi for a new trial, upon the ground on the plaintiff, citing *Simpson v. C.* Lord *Abinger C. B.* was reported to give an opinion, that in a case like the present the onus was incumbent on the plaintiff to prove con

Theobald for the plaintiff, showed the replication having affirmed that the consideration for the plaintiff was for valuable consideration not with a verification, but to the contrary. The defendant was bound to prove the want of consideration at the first instance; *Low v. Burroughs*. There is no difficulty in that part of the case. The burden of proof clearly lies on the defendant. *Alderson B.* The replication admits that the

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ion bill, and states in the affirmative that the
 ement to the plaintiff was for consideration: but
 affirmative is in answer to a negative. On the
 on whether the plaintiff or defendant was first
 evidence on this issue, it seems to be a proper
 consider whether, if the particular allegation
 truck out of the plea, any defence to the action
 remain? In that point of view it is immaterial
 er the allegation be in the affirmative or negative.
Abinger C. B. The point which here arises is,
 er supposing the defendant to have proved by
 ses the facts which this replication admits, viz.
 he bill was accepted by the defendant for the
 modation of *S. Barber*, who gave no value to
 fendant for his acceptance, it was incumbent on
 aintiff to prove his own title to sue as the in-
 of *S. Barber*, by showing himself to be more
 he agent of that person, who had received the
 [without consideration.] No such onus lay on the
 ff, unless some fraud or other defect in his title
 een first shown by the defendant. The single
 f a bill having been first given without consi-
 on between the original parties, did not throw
 n that burden. That position is not contra-
 by the following passage in *Bayley on Bills*,
 lit. 372: "In many cases the plaintiff is com-
 le to prove that either he or some preceding
 took the bill or note *bonâ fide*, and for value; as
 of a bill or note originally given without consi-
 on, and whilst the person giving it was under
 , or in case of a bill or note obtained by fraud,
 asferred by delivery by a person not entitled to
 t, as in the instance of bills or notes which have
 stolen or lost." Nor does *Fentum v. Pocock*(a)

(a) 5 Taunt. 192.

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show any practice of plaintiffs in actions on accommodation bills, to prove that they gave value for them. For whether such proof was given or not, it would have been equally held that an accommodation acceptor is to be taken only as a surety, who is discharged by time given to the drawer. An accommodation bill is not like a fraudulent transfer. [*Parke B.* If a fraud, it is rather against the holder than the acceptor. *Alderson B.* The object of accepting an accommodation bill is to raise money for the drawer. So that no such inference arises as that contended for, viz. that the indorsee is a holder without consideration, but rather the contrary. In *Percival v. Frampton* (a), *Parke B.* says, "The simple fact admitted on the pleadings is, that the indorsement was for the maker's accommodation; but no inference arises that the holders of the note were not holders for value; on the contrary, the fact of their holding it, joined with the indorsement on it, raises the presumption that they gave value for it, that being the very object for which it was made." Lord *Abinger C. B.* The difficulty which occurs to me is, how this defendant was to give evidence on a subject with which he cannot be taken to have privity.] He as well as the plaintiff might call the drawer who transferred it to the plaintiff (b). [*Parke B.* Every indorsement *prima facie* imports value. It always appeared to me that the parties impugning an indorsee's title should throw some suspicion on it before he could be called on to prove consideration (c). *Thomas v. Newton* (d) is

(a) 5 Tyr. 581.

(b) See *Dickinson v. Prentice*, 4 Esp. 33; and other cases cited, Bayley on Bills, 4th edit. 419, 420.

(c) See the judgment of the learned baron while a judge of K. B. in *Henth v. Sanson*, 2 B. & Adol. 297; and 4 Tyr. 596.

(d) 2 Car. & P. 606, A. D. 1827; cited 2 B. & Adol. 294, *Henth v. Sanson*.

nearest this case, but there the plaintiff's title was impeached. Merely giving notice to a plaintiff to prove consideration, had been long before held insufficient to compel a plaintiff to do so; *Reynolds v. Chet-
tle*(a). As no fraud, gaming, duress, &c. appear to disprove the presumption of consideration, this plaintiff seems to me entitled to the verdict. *Low v. Chifney*(b) is in support of the plaintiff's argument.]

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Humfrey for the defendant supported the rule. As the pleadings admit this to have been an accommodation bill between the original parties, and to have been accepted without consideration, the plaintiff was bound to prove that he gave value for it, according to the opinions of a majority of the court in *Heath v. Sansom*(c) *Parke B. Percival v. Frampton*(d) is a decision of this court, contrary to that of *Heath v. Sansom*.] The reasoning of Lord *Tenterden* C. J. and *Littledale* J. in *Heath v. Sansom*, applies to the case of an accommodation bill; for though it was there said that the case of such a bill it may be presumed that value has been obtained for it, but that where a bill has been obtained by fraud, or lost, or stolen, the inference might arise that the holder had not given consideration for it,—it is difficult to understand by the remote holder of a bill, which may have passed through many hands since the loss or stealing &c., is it as likely to have given value for it, as when it was originally an accommodation bill. If in case of a stolen bill, the thief may be presumed to part with

(a) 2 Camp. 596, cor. Lord *Ellenborough*.

(b) 1 Bing. N. C. 267.

(c) 2 B. & Adol. 297. Mr. Justice *Patteson* afterwards rested his opinion on the prior circumstances of suspicion proved in that case; see *Whit-
ter v. Edmunds*, 1 Mood. & Rob. 167; and 5 Tyr. 596.

(d) 5 Tyr. 579; and see *ante*, 286.

Bench; but it is submitted that that correct. [*Bolland B.* In *Wyatt v.* action was by a remote indorsee against of a bill given for losses on an illegal action; and *Eyre C. J.* held, that provision was not declared to be void by law, though the original transaction being contrary make it necessary for the plaintiff to consideration till the defendant had in solicited him in the transaction, or respecting it.]

The judgment of the Court was affirmed by

LORD ABINGER C. B.—This was an action by the acceptor of a bill of exchange, in which the defendant pleaded that the bill was given for consideration, and for the accommodation of the plaintiff, and was indorsed over to the plaintiff, to which the plaintiff replied, that no consideration was given to him for valuable consideration at the trial was, whether upon this plea the plaintiff was bound to prove that he gave consideration for the bill. Both parties having refused to insist on their respective pleas, the court held that he was not bound to show

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acted the verdict to be entered for the plaintiff, and
are now to determine whether he was right in so
ing. It is rather a question of practice than of law.
ere is no doubt of the law, that where a plaintiff
not given consideration for a bill of exchange, for
h no value has been previously obtained, he can-
recover upon it, but the question is, from which
y the evidence is to come. On the argument,
s were cited to show that the practice has been,
t when the defendant had established that the bill
an accommodation acceptance, the plaintiff pro-
ded to prove that he gave consideration for the
; and so far as my experience goes, that has been
course adopted. I never knew the point mooted
pt in the cases quoted for the plaintiff on showing

A practice had grown up for the defendant
e notice to the plaintiff to prove consideration,
t was very common for the latter, on receiving
a notice, to put an end to doubt, by showing con-
tion in the first instance. But I have known it
wise, where the plaintiff has refused to do so until
efendant has given proof that the bill was an ac-
modation bill, after which the plaintiff has adduced
nce in reply of being a holder for value. The
s have taken into consideration this question,
from its importance, for the purposes of plead-
ought to be settled. Both Mr. Justice *Little-
dale* and Mr. Justice *Patteson* have on deliberation with-
in the opinions expressed by them in *Heath v.*
Om. In *Simpson v. Clarke* undoubtedly I stated
the practice was what I have now stated it to be.
not for me, however, to set my opinion against
of the rest of the judges. In *Simpson v. Clarke*
expressly said that the point was not of importance
he determination of that case, though certainly the
ination of my opinion was, that it was the conve-

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nient practice. But I think I made a distinction, which is not reported, between bills obtained for accommodation, and by fraud. There is certainly an obvious distinction between the two cases. A man who does not come into court with any suspicion of fraud, but merely as the holder of the bill, may in the first instance be fairly presumed to be a holder for value, and the fact that the acceptor has received no consideration, is no proof that value has not been obtained for the bill; for persons frequently lend their names for the purpose of raising money. Therefore, unless the case is in some manner marked with fraud—unless the bill has been lost, stolen or clandestinely taken away, so as to raise suspicion that the indorsee is not a holder for value, the *onus probandi* ought to rest with the defendant. In deciding the present case, we are only required to lay down this rule, that where the simple fact proved is that the bill is an accommodation acceptance, that alone will not cast on the plaintiff the burden of proof that he gave value for it. On these grounds, therefore, the court, after consulting with the judges who have been supposed to be of a different opinion, have come to the conclusion, that in the present case the *onus probandi* lay on the defendant, and that he should have shown that the plaintiff gave no value for the bill. Under the circumstances, however, the plaintiff may have a new trial on payment of costs.

Rule accordingly.



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BRYANT *against* CLUTTON, Gent. One &c.

TRESPASS for assault and false imprisonment. Pleas: first, not guilty; secondly, a justification of the trespasses under an attachment issued out of the Court of King's Bench, for a contempt in non-payment of costs, pursuant to the master's allocatur. Re-*plication, de injuriâ*. The cause came on for trial before Lord Abinger C. B. at the *Middlesex* sittings after last *Michaelmas* term. The plaintiff's counsel stated, that the plaintiff being in the custody of the marshal at the suit of another person, was brought up to the Court of King's Bench under an order for an attachment against him for non-payment of costs, obtained by the defendant an attorney, and lodged his clerk with the marshal as a detainer; that he was then re-committed by the court to the same custody on the attachment for non-payment of costs, and imprisoned thereon for four years and a half. The chief baron asked whether the defendant had personally acted in the plaintiff's imprisonment, and being answered in the negative, nonsuited the plaintiff, being of opinion that trespass would not lie, and that it was the only remedy if malice could be proved. He held, that as no trespass had been committed, the second issue became immaterial. A rule to set aside the nonsuit having been granted on the authority of *Bates v. Pilling (a)*,

Platt showed cause. The defendant was already in custody, and was further imprisoned, not in consequence of any act of the defendant, but by the judicial act of the Court of King's Bench who granted the attachment. Trespass would not lie against a prosecutor

The plaintiff being in the custody of the marshal, was brought up by that officer to the Court of King's Bench on an order of that court, obtained by the defendant, which had been lodged with him. He was there committed to the same custody on an attachment for non-payment of costs, and detained accordingly: Held, that he could maintain trespass against the defendant who had caused the order to be lodged with the marshal, so as to call on the defendant to justify under the process. Lord Abinger C. B., *dissentiente*.

Semble, a sheriff is liable in trespass for arresting a person on process in which he is wrongly named.

(a) 6 B. & Cr. 38.

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for presenting a bill of indictment to a grand jury, which they find. Suppose that a defendant is wrongly named in the writ, but appears and proceedings go on to final judgment, would the sheriff be liable in trespass for taking him in execution? (a) [*Parke B.* was understood to intimate that there was no decision for exonerating the sheriff from such an action, where the process did not authorize the arrest.]

Bompas contra, was stopped by the court.

PARKE B.—I am of opinion that this rule should be made absolute. The plaintiff could not have been detained, but for the defendant's having lodged the order for attachment with the marshal. The defendant by so doing put that officer of the court in motion. The detainer was an immediate consequence of the defendant's act, for which he is liable in trespass (b). That act of his caused the plaintiff to be brought from prison into the court, and there to be remanded into a different custody. That was a *prima facie* trespass, which called on the defendant to justify it by pleading the order of court as his authority, and proving it in evidence. Without so doing no question as to its regularity could arise. As the case was disposed of at *nisi prius* on the general issue, and is now before us on that plea only, it appears to me that it was stopped too soon, and should go to a new trial.

BOLLAND B.—I am of the same opinion. The defendant was the moving cause of the plaintiff's imprisonment, and the order of the court could not be given in evidence on the general issue.

(a) See *Finch v. Cocken and others*, 5 Tyr. 778. 784.

(b) See 3 Wils. 379, *Barker v. Brubam and Norwood*; id. 341, *Parsons v. Lloyd*.

ALDERSON B.—I agree. The defendant takes a piece of paper to the marshal, in consequence of which he is detained. Is not that such an act by the defendant as he is called on to justify, by showing what the authority given by the paper was? On the plea of a general issue it was sufficient for the plaintiff to show that he was detained in custody by something which the defendant did: that, however, he was prevented from doing. Were the defendant's argument correct, we need not impose the usual terms, when we set aside executions for irregularity, that no action shall be brought (a).

LORD ABINGER C. B.—I remain of opinion that as the plaintiff was in custody of the marshal at the time of granting the attachment, his prolonged imprisonment is the act, not of the defendant himself, but of the court, for a contempt of which he had not purged himself by paying the costs, or setting aside the attachment for irregularity. The marshal was the officer of the court, and his bringing the plaintiff up did not alter the former custody or make it other than that of the court. To serve a sheriff or gaoler with a writ against a person already in his prison, directing him to keep him in custody, is not an act of trespass. So the lodging a detainer against a prisoner, cannot be an act of trespass while he is in custody on other process. There is no continuance of detainer took place before the order of court was made. But the rest of the court seem to think that the bringing up the plaintiff to be charged with the attachment which was caused by the defendant's act, made it a new custody. I incline to the contrary opinion, as the detainer was the act of the court, and the marshal had the plaintiff in his custody, and must have so had him wherever the Court of

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(a) See 5 Tyr. 725, *Riddell v. Pakeman*.

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King's Bench might be, *e.g.*, if it removed into another county. However, as the other judges are of a different opinion, there must be a new trial.

Rule absolute accordingly (a).

(a) As to this case see per Ashurst J. *Morgan v. Hughes*, 2 T. R. 231; 6 T. R. 315; 3 B. & P. 158.

DOE *dem.* READ and Others *against* ROE.

An affidavit stated that a declaration in ejectment was served on a servant who was left in charge of the premises. Held, insufficient to obtain judgment against the casual ejector, and the court refused even to grant a rule to show cause thereon.

WIGHTMAN moved for judgment against the casual ejector, on an affidavit which stated, that the copy of the declaration had been served on a female servant upon the premises, who told the deponent that she had been left in charge of them by the tenant in possession. [Lord Abinger C. B. Does the deponent in the affidavit say, that he believes the tenant has received the declaration?] No. At any rate the court will grant a rule nisi, and if the tenant has not received the declaration, she may make an affidavit to that effect. Here, the woman is left, not as an ordinary servant, but to take care of the premises.

Lord ABINGER C. B.—In order to obtain a rule you should have gone further, and shown that the servant was instructed to send all papers to her mistress, and have stated your belief that she had done so.

Rule refused.

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NORTONS' Bail.

JERVIS objected in this case to the justification in person, of bail living beyond the bills of mortality, on the ground that the notice of justification did not state whether they meant to justify in person or by affidavit. It was supposed they intended to justify by affidavit, and the notice should have stated which course they proposed to adopt. [*Alderson B.* That was not necessary.] *Jervis* then applied that the costs of justification might not be allowed on the above ground.

A notice of justification of bail need not state whether the bail intend to justify in person or by affidavit.

ALDERSON B.—The bail have justified in respect of the property mentioned in the notice. The costs must be allowed.

PREEDY and Another *against* LOVELL.

DOGERS had obtained a rule nisi, why the judgment signed in this cause, and all subsequent proceedings thereon, should not be set aside for irregularity, and why the cognovit or paper writing signed by the defendant should not be delivered up to be cancelled. The affidavit on which the rule was moved was made by the defendant's attorney, and stated that the defendant having been served with a writ of summons, had called on the plaintiff's attorney, and was induced to sign an agreement for the payment of debt and costs, with an understanding that in case the defendant could prove there was any error in the writ that it should be rectified. That the defendant's affidavit on which it was obtained having been made by the defendant's attorney and not, as it ought to have been, by the defendant himself.

A rule nisi had been obtained to set aside a judgment signed upon a cognovit given by the defendant, on the ground that such cognovit had been given upon an agreement with the defendant personally, which had not been fulfilled. On showing cause the rule was discharged,

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ant afterwards investigated the account and discovered an error, which he had pointed out to the plaintiffs and their attorney; but they would not allow the same according to the understanding existing between them.

Bayley for the plaintiffs, took a preliminary objection to the affidavit, which he contended was not sufficient to call upon him to show cause, inasmuch as it was not made by the defendant himself, but by his attorney.

PARKE B.—The affidavit does not even state the attorney believes the representation made to him by his client to be true. This rule must be discharged, but without costs.

The other barons concurred.

Rule discharged.

PEARSON *against* SKELTON.

The rule that there is no contribution among wrong-doers does not apply to a case where the party seeking contribution is a tort-feasor merely by inference of law.

ASSUMPSIT for money paid. Plea: *non assumpsit*. At the trial before Lord *Denman* C. J. at the last *Yorkshire* assizes, it appeared that the plaintiff and defendant, with several other persons, were jointly interested in a stage coach that ran from *Leeds* to *Richmond*. The coach and horses running between *Leeds* and *Knaresborough* were provided by the plain-

Several persons were jointly interested in a stage coach, and there was a partnership fund out of which the expenses were first to be paid, and the residue divided among them. Held, that one proprietor who had paid the damages and costs recovered in an action which had been brought against him for damage done by the negligent driving of the coachman, could not recover at law from another proprietor his proportion of such damages and costs.

From the latter place another coach proceeded *Rippon*, and from thence a third coach continued the journey to *Richmond*. The two latter coaches were horsed by the other partners. On one occasion as the plaintiff's coach was proceeding from *Leeds* to *Harrowgate*, the negligence of the driver occasioned the death of a horse belonging to a person of the name of *Pickles*, who brought an action against the plaintiff and another, and recovered. The plaintiff having paid the damages and costs in that action, now sought to recover contribution from the defendant. It was objected, first, that the present action would not lie, as one tortfeasor cannot recover contribution from another, in support of which point *Merryweather v. Nixon* (a) was cited; and secondly, that the parties being partners the plaintiff could not maintain an action against the defendant at law, but could only sue in equity. The Lord chief justice nonsuited the plaintiff, giving him leave to move to enter a verdict for 6*l.*, being the amount at which the defendant's contribution was estimated.

Knowles now moved accordingly. In *Merryweather v. Nixon* the defendant was actually employed in or was accessory to the commission of the tort, and the rule thereby established does not apply to a case like the present, in which the plaintiff is made a wrongdoer merely by inference of law, being held liable for the act of his servant. This distinction was recognised in *Adamson v. Jarvis* (b), where it is laid down that "the rule that wrongdoers cannot have redress by contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

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(a) 8 T. R. 186.

(b) 4 Bing. 66:

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In *Woolley v. Bate* (a), which was a similar case to the present, it was held the action might be maintained. With respect to the second point, that these parties being partners an action at law will not lie, it may be a question whether that objection can be taken under the general issue. [*Parke B.* There is no doubt it may, for if this was a partnership transaction, the money was paid on account of the plaintiff and defendant, and not to the use of the latter (b). Was there any partnership fund?] Yes. The parties horsed different parts of the road, but the coachman was paid out of the fund. There were three coaches, but they were considered as one for certain purposes. The rule that one partner cannot maintain an action against another, only prevails where the cause of action arises in the ordinary course of business, and does not apply to a transaction which is unconnected with the general objects of the partnership. In *Burnell v. Minot* (c), a joint contractor who referred the amount of damages sustained by a breach of the contract to arbitration, and subsequently paid the sum awarded, was allowed to recover a moiety of the amount from his co-contractor. [*Parke B.* In that case there was no partnership fund out of which the money was to be paid.] In *Woolley v. Bate* this objection, had it been thought tenable, would undoubtedly have been raised, but it does not appear to have been taken.

PARKE B.—How were the profits divided? Did the partners divide the net profits, after the payment of all expenses, or the gross profits according to the number of miles that each partner horsed the coach? If the latter was the case, there was no common fund,

(a) 2 Car. & P. 417.

(b) See *Worrall v. Grayson*, ante, 477.

(c) 4 B. Moore, 340.

d you will be entitled to a rule; but if there was a partnership fund out of which losses were to be paid, your remedy is in equity. We will consult the lord chief justice, and ascertain what evidence he has upon the notes, as to the existence of a partnership fund. With respect to the first objection taken at the trial, it does not apply.

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On a subsequent day *Parke B.* said, that on consulting the notes of the lord chief justice, it appeared that there was a partnership fund out of which the expenses were first to be paid, and the residue divided among the partners; consequently the non-objection was right.

Rule refused.

BALLARD against WAY and Another.

ASSUMPSIT. The declaration stated, that the defendants, surviving executors of the will of *Henry Boulton*, deceased, theretofore, to wit, on the 14th of *March* 1835, by certain persons carrying on business as auctioneers under the name, style, and firm of *Elgood and Ward*, the agents of the defendants, at that behalf duly authorized, caused to be put up and exposed for sale by public auction, certain premises, certain leasehold houses were sold by auction, and were described in the particulars and conditions of sale, as a well-secured rental with reversionary interest, and as a safe and valuable investment. The premises in question were liable to be taken for the purposes of the *South London Market Company*, under the provisions of a local act. The particulars and conditions of sale gave no notice of this liability, and at the trial the jury found that the vendee had no notice of the act of parliament in point of fact. The conditions contained no express warranty of title. In an action by the purchaser against the vendors, held, that the first count of the declaration stated the contract too largely, in setting it out as an undertaking by the defendants, that they had good title to sell the property free from all incumbrances and liabilities. Held also, that the purchaser, on ascertaining that the liability to which the premises were subject, had a right to rescind the contract, and was entitled to recover back his deposit under the count for money had and received.

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perty described in a certain particular of sale thereof before then made, published, and circulated by the defendants. [The conditions of sale were then set out.] The declaration then averred, that on such exposure to sale as aforesaid, to wit, on &c., the plaintiff was the highest bidder for, and became and was the purchaser of the said property, so described in the said particulars of sale as aforesaid, upon and according to the said conditions of sale, at and for a certain price or sum, to wit, the sum of 455*l.*, and then and immediately after such sale paid into the hands of the said auctioneers, according to the said conditions, a large sum of money, to wit, the sum of 113*l.* 15*s.* as a deposit of 25*l.* per cent., in part of the said purchase money, and which said sum was then accepted by the said auctioneers as the deposit, according to the said conditions of sale; and then also paid another large sum, to wit, the sum of 6*l.* 12*s.* 8½*d.* as one moiety of the said auction duty, payable in that behalf, and then signed an agreement for payment of the remainder of the said purchase money, and to complete the said purchase according to the conditions aforesaid. And thereupon afterwards, to wit, on &c., in consideration of the premises, and that the plaintiff, at the special request of the said defendants, had then undertaken and faithfully promised the said defendants to perform and fulfil all things in the said conditions of sale contained on the said plaintiff's part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, they the said defendants undertook and faithfully promised the said plaintiff to perform and fulfil all things in the said conditions of sale on the vendors' part and behalf to be fulfilled; and that they then had good and sufficient right, title, power, and authority to sell, transfer, and assign the said property to the plaintiff, free and clear of and

m all charges, contracts, *incumbrances and liabilities* whatsoever, other than and save and except those stated and set forth in the said description thereof in the said particulars of sale. And the plaintiff in fact did, that although he on the day and year first aforesaid, and from thence until then and upon the said 14th day of *April* then next, and afterwards, was ready and willing to have performed and fulfilled all things required by the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to have been performed and fulfilled, and to have accepted a proper assignment of the said property at his own expense, and to have paid the remainder of the said purchase money according to the conditions of sale, and to have completed the said purchase, whereof the defendants afterwards, to wit, on &c., and often before and since the said notice, and were requested to make a proper assignment to him, the plaintiff, of the property so bid for and purchased by him as aforesaid, free and clear of and from all charges, contracts, incumbrances, and liabilities whatsoever, other than and save and except those stated and set forth in the said description thereof in the said particulars of sale: yet the defendants, contriving and intending to deceive, defraud and injure the plaintiff, did not perform or regard their said promise and undertaking in this, to wit, that they did not at the time of the said exposure to sale, and the said purchase, and of the making their said promise and undertaking, good and sufficient or any right, title, power, or authority, to sell, transfer, and assign to him the said property free and clear of and from all charges, contracts, and incumbrances and liabilities, other than and save and except those stated and set forth in the said description thereof in the said conditions of sale, in this, to wit, that five of the said six houses so put up and exposed to sale, and

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sold by the defendants and purchased by the plaintiff as aforesaid, to wit, the said houses numbered respectively 113, 114, 115, 116, 117, long before the said exposure and putting up thereof to sale and purchase as aforesaid, and long before the time of making the said promise and undertaking of the said defendants, to wit, on &c., had been and were inserted in a certain schedule annexed to a certain act of parliament made and passed in the fourth year of the reign of his present majesty, intituled, "An act for erecting and establishing a market in the parish of *St. George the Martyr*, in the borough of *Southwark*, in the county of *Surrey*," as part of the property which a certain company by the said act incorporated by and under the name of the "*South London Market Company*," were authorized and empowered to treat for, purchase, and take and use for the purposes of the said act. And the plaintiff further said, that the said five of the said six houses so put up and exposed to sale and sold by the defendants to and purchased by the plaintiff as aforesaid, at the time of such putting up and exposure to sale, and such sale and purchase thereof as aforesaid, and at the time of making such promise and undertaking of the defendants, were and still are and remain subject and liable to be treated for, purchased and taken by the said company, in the said act mentioned, for the purposes of the said act; and if he accepted an assignment and transfer thereof, he would, by reason of the right of the said corporation to treat for and purchase the same, be hindered and prevented from disposing of the same in such manner and to such advantage as he would and might do but for such right of the said corporation; and the value of the said purchase was and is much less than the same would be if such right did not exist, and the property is by reason of such right of the said cor-

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portion of little or no value; and the remaining  
one of the said six houses, to wit, the said house  
numbered 112, was and is of no value to the plaintiff,  
without the said five other houses: And by reason  
of the premises the said plaintiff had been deprived  
of all the benefits and advantages which would have  
arisen from the completion of the said purchase, and  
had been put to great expenses, amounting in the  
whole to a large sum of money, to wit, the sum of  
200*l.* in investigating and endeavouring to procure  
such title and assignment as aforesaid, and had lost  
all gains and profits which he might and would other-  
wise have made and acquired from using and employ-  
ing the said sums of money so paid by him as deposit  
and duty as aforesaid, and other monies provided and  
kept by him the said plaintiff for the completion of  
the said purchase. There was a second count for  
money had and received; a third for interest; and a  
fourth on an account stated.

Pleas: first, *non assumpsit*; secondly, that the said  
property was and is described in the said particulars  
of sale in the said declaration mentioned, as situate  
and being at the corner of *Earl Street*, and that the  
said property was and is also described in the schedule  
so annexed to the said act of parliament, as situate  
and being at the corner of *Earl Street* aforesaid: And  
the defendants further say, that the description of the  
said property in the said particulars of sale, under and  
subject to which the said property was so put up and  
exposed to sale, and so purchased by the plaintiff as  
in the said declaration mentioned, in other respects  
corresponded and agreed with the description thereof  
in the said act of parliament, and the description  
thereof in this particular identified the same with the  
said property so in the said schedule mentioned; of  
all which the plaintiff at the time of the exposure of

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the said property to sale, and of such purchase thereof by him the plaintiff as aforesaid, to wit, on &c., had notice. Verification.

The replication to this plea set out the description of the premises in the particulars, and in the schedule to the act, and averred that the description did not correspond, and that the plaintiff had not, at the time he so bid for and became the purchaser of the said property, any notice that the said five houses, part of the said property so bid for and purchased, were, or that any of them was, mentioned in the said schedule to the said act of parliament, or that they were liable to be treated for, purchased, and taken by the said company, for the purposes of the said act. Verification.

Rejoinder, that the description of the said property contained in the said particulars of sale, so far as the same related to the said five houses, part thereof, did correspond and agree with the description thereof, in the said schedule annexed to the said act of parliament, and that the plaintiff had, at the time he so bid for and became the purchaser of the said property described in the particulars of sale, notice that the said five houses, part of the said property, were, and that each of them was mentioned in the said schedule annexed to the act of parliament, and that they were liable to be treated for, purchased, and taken by the said company for the purposes of the said act; concluding to the country. Issue thereon.

The defendants, in the first instance, demurred to the special count, and the point thereby raised, whether the liability of the property to be taken by the *South London Market Company* was a liability against which the vendors had covenanted, was argued by *Coote* in last *Michaelmas* term. The court, however, held, that as the defendant by demurring had admitted

they had entered into a contract whereby they covenanted against all liabilities, the question was not open to them. The defendants then obtained leave to amend, and pleaded as above set forth.

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At the trial before Lord *Abinger* C. B. at the sittings in *London* after last *Hilary* term, the particulars of sale were given in evidence, which were thus headed: "Well secured rental of 62*l.* 10*s.* per annum, for about 15 years, with reversionary interest. Particulars and conditions of sale of an eligible investment secured upon houses and shops in that extensive thoroughfare, and commanding situation for business, the *London Road*." In describing the premises, the following sentence occurred. "This property being eligibly situated and well tenanted, offers a safe and desirable investment." It was stated to be held by a lease for sixty-one years commencing at *Midsummer* 1789, and to be underlet for certain terms of years, which were specified, the net rental amounting to 62*l.* 10*s.*, the words "with reversionary interest," being added at the end. It appeared that no notice was given at the sale, or at any other time, that the property was liable to be taken by the *South London Market Company*. With respect to the issue, whether the description in the particulars of sale and that on the schedule of the act corresponded, the plaintiff adduced evidence to show that there was difficulty in identifying the two descriptions, and the jury found that they did not correspond, and also that the plaintiff had no express notice of the act. The lord chief baron was of opinion that the first count was not proved by the evidence, and nonsuited the plaintiff, with leave to move to enter a verdict on the issue raised on the special plea, if the court should be of opinion that the act of parliament was not of itself notice to the plaintiff.

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Erle having on a previous day in this term obtained a rule to show cause why the verdict should not be entered for the plaintiff on the first count for the deposit and expenses of investigating the title, or on the second count for the deposit alone,

Platt and *Barstow* now showed cause. The special count was not proved at the trial, for the contract established in evidence was different from that alleged. That count, after setting out the conditions of sale, and the purchase of the property by the plaintiff, states an assumpsit by the defendants, and the point is, whether such assumpsit is necessarily implied by law from the contract. The plaintiff contends it is, and *Wilde v. Fort* (a) is relied on as an authority; but in that case the declaration contained no such assumpsit as the present. The question is, what is the extent of liability of the vendors under the contract of sale, which contains no express warranty of title. It is quite a new point to say that the vendor of leasehold property engages to insure the purchaser from all liabilities whatsoever. A liability to be taken for public purposes under an act of parliament on a compensation being made, has never been considered as an objection to the title. Such a position is nowhere laid down in the books, and if it could be maintained, it would affect a great portion of the property throughout the kingdom. By the act for the management of the customs, 3 & 4 Will. 4. c. 51. s. 35. *et seq.*, which is merely a re-enactment of clauses contained in former statutes, the Commissioners of the Treasury are authorized, when they see fit, to take half an acre of land within half a mile of the sea-shore, or of the tideway of any navigable river, for a station-house for the customs or ex-

(a) 4 Taunt. 334.

se. A large extent of property is subject to the liability created by the above act, and lands so subject must have been frequently bought and sold, and yet no such objection as that now urged has ever been raised. So there are numerous highway, canal, and railway acts, containing similar provisions, and if the objection is allowed to prevail, it may lead to the most serious consequences. A party would never be safe in exposing his property to sale, for it might turn out that some liability attached to it, created by an act of which he was completely ignorant. The only case bearing the slightest analogy to the present is *Oldfield v. Round* (a). There a meadow was sold without any notice of a footway round it, or of one across it, which of course lessened its value. Lord Rosslyn decreed a specific performance with costs, observing that he could not help the purchaser who did not choose to inquire. Here no fraud is imputed to the vendors, who are executors, and were as ignorant of this liability as the purchaser. Admitting that the latter had no notice of the act of parliament affecting this property as a point of fact, yet as the act is a public one, though of local nature (b), it must be taken that he had notice

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) 5 Ves. 508.

) Cooté on the previous hearing had argued that the original distinction between public and private acts was not according to their subject-matter, but rested on whether they were sent to the sheriffs for promulgation, or whether they were printed by the king's printer after printing was introduced. He cited the statutes of 1 Ric. 3. 5 W. & M. c. 8. s. 1. 5 Ann. cc. 3, 4, 5. and the resolutions of both Houses of Parliament for Promulgation of the Statutes in 1713. *Hass v. Stevenson*, 3 B. & P. 565. Sugden's Vendors, 8th ed. 744. His collection of Statutes in 1803, enumerating local and personal acts printed by the king's printer, and called "quasi public" acts, which since 1815 have been placed under the title "Private Acts printed by the King's printer," and whereof the printed copies may be given in evidence. Phillipps's Statutes, 6th ed. 384. He argued that in *Barrow v. Archer*, 2 Simons, 438, the question whether the party had notice of the act must have come before the Vice-Chancellor. See *Tyrwhitt and Tyndale's Digest of the Statutes*, Preface, p. ix.

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of it in point of law. Secondly, it is submitted, if the first count cannot be supported, that the defendants are entitled to retain their nonsuit, for the plaintiff cannot maintain the count for money had and received while the contract is subsisting. And even supposing the plaintiff has a right to rescind the contract, he must do so in clear and distinct terms ; but no notice of any intention to rescind has been given to the defendants.

*Erle, Sir William Follett and Petersdorff, contra.* There can be no doubt that the contract of the defendants amounts to a general warranty of good title. In the particulars of sale they describe the property as eligibly situated, and as offering a desirable investment. Parties selling by this description come within the meaning of the rule of a vendor selling an estate free from incumbrances. Here the defendants have taken upon themselves to dispose of a permanent investment in those houses, which they could not do, as the premises might have been pulled down immediately after the sale for the purposes of the company. They have consequently made a contract which they cannot perform, and the purchaser is at liberty to rescind the agreement. Every vendor does impliedly contract against a liability like the present. The houses were absolutely included in the schedule to the act of parliament, of which the vendors, or their testator, must have had express notice, but which they did not communicate to the plaintiff. It is said, however, that he was bound to take notice of the act. But there is a difference between public acts and private acts that are merely made public for the purpose of being given in evidence. It has been decided that local acts are not, as against strangers, evidence of the facts therein

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recited; *Brett v. Beales* (a). The clause directing that they shall be deemed public acts, and judicially taken notice of as such, is inserted merely to make them admissible in evidence, and does not affect persons who are not parties to them with notice of their provisions; *Woodward v. Cotton* (b), *Beaumont v. Mountain* (c). There are many species of liability that have been held to rescind a contract. Where a vendor has committed an act of bankruptcy, he cannot compel a specific performance, although he swears he does not owe a single debt; because it is impossible to ascertain distinctly that there is no debt existing capable of supporting a commission; *Lowe v. Lush* (d), *Cann v. Cann* (e). So where the vendor of newly inclosed lands undertook to convey them to the vendee, it was held to be an undertaking to convey the legal estate, and that the vendor having only an equitable interest previous to the assignment by the commissioners, the vendee was entitled to recover his deposit; *Cave v. Baldwin* (f). So it has been decided that a purchaser is not compellable to accept a title subject to an incumbrance, the discharge of which is shown only by presumption; *Barnwell v. Harris* (g). *Wilde v. Fort* (h) is to the same effect. [Parke B. What do you mean in the declaration by the word "liabilities" taken with the context?] Any liability which will deprive the purchaser of the enjoyment of the property. It is the most apt expression that could have been used under the circumstances. It is said that the words "all liabilities" are too large, but they mean liabilities by which the vendors of these houses are affected. The defendants would not be bound by a contract for a lease, and therefore such a

(a) Moo. &amp; M. 421.

(b) 4 Tyr. 689.

(c) 10 Bing. 404; 4 Moo. &amp; Sc. 177.


(d) 14 Ves. 547.

(e) 1 Sim. &amp; Stu. 28.

(f) 1 Stark. 65.

(g) 1 Taunt. 430.

(h) 4 Taunt. 353.

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contract is not within the meaning of the words. They do not intend liabilities to which all lands are subject, but such only as specifically affect this property. The contract is therefore correctly described in the declaration. If the liability be a defect in the title, the purchaser is at liberty to show it, notwithstanding the conditions of sale may contain a stipulation that the vendors shall not be called upon to produce the title of the lessors; *Shepherd v. Keatley (a)*, *Flight v. Booth (b)*.

LORD ABINGER C. B.—The court is strongly of opinion that this contract may be rescinded. The plaintiff never contemplated receiving a mere compensation for his purchase, which was represented to be an eligible investment secured upon the houses. Those representations alone would be sufficient to avoid the contract, and our opinion is therefore made up as to the plaintiff's right to rescind it, which will entitle him to a verdict on the second count. With respect to the question of variance in the first count, the court will consider before pronouncing its judgment. I do not think that this act of parliament, though it is to be judicially taken notice of for the purposes of evidence, affects the whole world with notice. If you want to make use of an act like the present you must give it in evidence; whereas the court is bound to notice a public act.

PARKE B.—This is an act obtained as a matter of private speculation, of which the vendors must have been aware, and it therefore appears to me that the liability of this property to be taken for the purposes of the act is a defect, against which a covenant for good title would apply.

(a) 4 Tyr. 571.

(b) 1 Bing. N. C. 370; S.C. 1 Scott, 190.

The *Court* took time to consider the other point.

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LORD ABINGER C. B.—We have looked at the declaration in this case, and are of opinion that the word “liabilities” includes liabilities of every kind, and consequently, that as regards the first count, the defendants are entitled to a verdict. With respect to the count for money had and received, we think the plaintiff is entitled to recover the 100*l.*, the amount of the deposit, as he has a right, under the circumstances, to find the contract.

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MR. B.—The liability to which this property is subject was created by a private act of parliament, to which the defendants’ testator may be considered as a party, and the case is therefore much the same as if he had entered into a private agreement, by which the premises were liable to be taken down. It is possible that there can be a good title to property subject to such a liability. In the first count, however, the contract is stated too largely, as such contract should be considered as referring only to liabilities affecting this particular estate. But on the count for money had and received the plaintiff is entitled to recover. The verdict, consequently, must be entered for the defendants on the first count, and for the plaintiff on the second count, and also on the special plea putting the question as to notice.

Rule accordingly.

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PERSE *against* BROWNING.

An affidavit of debt was sworn in *Ireland* before a commissioner of the Common Pleas and Exchequer: Held, that the title of the court need not be prefixed to the affidavit at the time it is sworn, but that the affidavit might be taken before such commissioner, and afterwards entitled and used in either court.

**BAYLEY** applied for a rule to take out of court the money deposited with the sheriff in lieu of bail, and to enter a common appearance in this cause, on the ground that there were several irregularities in the *capias* and affidavit of debt. One irregularity alleged was, that the title of the court prefixed to the affidavit, which had been sworn in *Ireland* before a commissioner of the Common Pleas and Exchequer, appeared to have been inserted after the affidavit was sworn, inasmuch as it was in a different handwriting from the body of the affidavit, and corresponded with that in which the *capias* was filled up.

**PARKE B.**—Even if that were so, I do not think the objection will avail. There is no necessity that the title of the court should be there before the affidavit is sworn, it is sufficient if it is sworn before an officer of the court. The person before whom this affidavit was taken was an officer both of the Common Pleas and the Exchequer, and after being sworn it might have been used in either court.

Another objection was, that the *capias* was addressed to the sheriffs instead of the sheriff of *Middlesex*, and on that ground the court made the rule absolute to set aside the writ with costs: no action to be brought against the sheriff or the plaintiff, and the plaintiff to be at liberty to arrest the defendant again.

Rule accordingly.



ALEXANDER *against* VANE.

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**ASSUMPSIT** for the keep and feeding of horses for the defendant, goods sold and delivered, work and labour, money paid, and on an account stated. As to the general issue, except as to 33*l.* 5*s.* parcel, and as to the residue, payment of that sum into court, which the plaintiff took out of court and accepted in full satisfaction of the residue of the causes of action mentioned in the declaration. At the trial before *Jurymen* B. at the *Middlesex* sittings after last *Michaelmas* term, it appeared that the defendant being about to commence running a coach between *London* and *Highgate*, went, accompanied by the plaintiff, to the shop of one *Palliser*, a harness maker, and gave the latter an order for harness to the amount of 95*l.*, the plaintiff saying, upon the order being given, that if the defendant did not pay he would. The goods were supplied to the defendant, but a balance remaining due, the plaintiff went to *Palliser*, and induced him to make an attachment against the defendant's horses, which the latter was about to remove out of the jurisdiction of the city, but which were then standing in the plaintiff's livery stables in *London*. The horses were accordingly attached, and the attachment being placed in the hands of the plaintiff's clerk, the defendant gave two cheques each for 30*l.*, which were post dated, to the plaintiff, who handed them over to *Palliser*, whereupon the horses were released from the attachment. The defendant subsequently paid *Palliser* 33*l.*; the sum of 30*l.* 10*s.* was discharged by the plaintiff, and the cheques were returned to the defendant. On the part of the defendant it was contended, that the payment of the balance by the plaintiff was voluntary, and a letter of the plaintiff's was given in evidence, which was proved to have been sent on the 20th *October*,

*A.* accompanied by *B.* went to the shop of *C.* and ordered goods, *B.* saying in *A.*'s hearing, that he would pay for them if *A.* did not: Held, that an implied authority was thereby given by *A.* to *B.* to pay the money on *A.*'s default, and that *B.* having paid it, was entitled to recover it back from *A.*, no countermand of the authority having been shown.

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wherein he said, "Will you permit me to pay Mr. *Palliser* the balance due to him, after deducting the headstalls sent back, as he and I have had continual words about my releasing your horses from the attachment? Say per bearer if I shall pay him." It was not shown that any answer was given to this letter, and the next day the plaintiff paid the balance. The plaintiff had a verdict for the 30*l.* 10*s.*, leave being given to the defendant to move to enter a verdict for him, if the court should be of opinion that the plaintiff was not entitled to recover. *Thesiger* having in *Hilary* term obtained a rule accordingly,

*Platt* (*Humfrey* with him) now showed cause. There were three parties to this contract; *Palliser* agreed to supply the goods, and the defendant to pay for them, the plaintiff undertaking to pay if the defendant did not. Although the plaintiff might have set up the statute of frauds in case *Palliser* had brought an action on his parol promise to pay the defendant's debt, yet the latter cannot take advantage of that statute. The defendant impliedly gave the plaintiff authority to pay for the goods, which was never revoked.

The Court then called upon

*Raines* (*Thesiger* with him) to support the rule. The undertaking of the plaintiff was not one that the law would compel him to fulfil; and, at any rate, an entire new arrangement was come to when the cheques were given, by which he was released from all liability. [*Parke* B. The plaintiff was not at any time liable to pay the debt; the case does not turn upon that. It is contended on the other side, that the defendant gave the plaintiff an authority to pay, which was not affected by the subsequent transactions.] The plaintiff's letter shows that the authority had been revoked, for in it he



permission to pay the money. Some subsequent  
 rity should therefore have been proved.

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and ABINGER C. B.—It appears to me that there  
 ground for supporting this rule. If the question  
 turned upon the attachment, it might have given  
 some perplexity, but it depends wholly on the  
 rity which the plaintiff had for paying the money.  
 although he was under no legal obligation, yet he  
 found in honour to pay it according to his promise,  
 was made in the presence of the defendant. The  
 impliedly gave him authority to pay the debt, and  
 done so, he may now recover the amount. If a  
 authorizes a banker to pay money for him, the  
 r, having no funds in his hands, is not bound to  
 the payment; yet if he does so, he may recover the  
 advanced. Then the plaintiff having an authority  
 , the question is, whether any thing has occurred  
 to make it. I think not; for all the conduct of the  
 ff afterwards shows that he considered himself  
 to pay the money. The cheques are given to  
 and his agency is kept up during the whole trans-

He goes to *Palliser* and makes some arrange-  
 with him to get back the cheques. If such  
 arrangement had amounted to a satisfaction of the  
 it would have been an answer to this action.  
 that was not so, neither was there any further  
 time given to the defendant. About a month  
 afterwards *Palliser* presses the plaintiff to pay the  
 , and then the latter writes the letter produced  
 in evidence, which was a very reasonable thing for him  
 after what had passed. If the defendant wished  
 to prove the authority he should have sent a reply to  
 the letter; but not having done so, there was nothing  
 in the letter itself to show that the authority was  
 given. We certainly ought not to strain any point

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against the plaintiff; the money was paid under that authority, and may now be recovered.

PARKE B.—I am of the same opinion. When the facts are rightly understood there is no difficulty about the case. The point which the plaintiff has to establish is, that he paid the money with the authority of the defendant. It appears that the defendant, being in want of harness, gave *Palliser* an order to the amount of 95*l.*, and that the plaintiff, in the presence of the defendant, (and the whole case turns upon that,) engaged to pay the debt if the defendant did not. The transaction amounted also to a contract on the part of the defendant with the plaintiff, to pay him the debt in case he paid it to *Palliser*. The question then is, whether the authority was ever countermanded; for, if not, the payment was made to the use of the defendant and at his request. After the plaintiff had entered into what was nothing more than an honorary engagement, he, finding that the defendant was about to remove his horses, induces *Palliser* to lodge an attachment against them. An arrangement is then come to for releasing the horses, on the defendant giving two cheques, which are post dated. The cheques passed through the plaintiff's hand to *Palliser*, and this tends to show that the authority still continued. The defendant being unable to pay the cheques when due, gets them back from *Palliser*, and pays part of the amount, with an understanding that time will be given him for payment of the residue. Up to this period there is nothing to show that the authority has been revoked, and the only remaining question is, whether the letter written by the plaintiff is any evidence of a countermand. As no answer to that letter was put in, we must assume that none was sent, and we must therefore look at the letter itself to see if any

g appears upon it tending to show a revocation. If there does, the defendant's counsel should have had to have had it left to the jury. It seems to me the letter may bear the interpretation that the plaintiff wished to have a written authority, and that we are not at liberty to draw the conclusion from it, that the original authority had been revoked. Consequently, the payment being made under a continuing authority, the plaintiff is now entitled to recover the amount from the defendant.

HOLLAND B.—It appears to me that the only question between the parties to this record is, whether there was any engagement by the plaintiff to pay this debt. If the defendant had not been present at the trial, there is no doubt he would have had a good defence to this action; but being present, although the plaintiff was not bound to pay the debt, he gave the defendant authority to discharge it. Then what is there in the rest of the case to show that the authority was revoked? The letter, as has already been suggested, may have been sent to obtain a written authority to discharge the debt, but it may also have been to ascertain what the balance of the debt was, after deducting the amount of the headstalls which were returned. The attachment and the other facts in the case do not seem to vary the question. Supposing the plaintiff to have given a written guarantee for this debt, he might have claimed to have been released by the attachment made upon the goods of the defendant, but it is no defence on the part of the latter, neither can he avail himself of the time which was given to him. The plaintiff is clearly entitled to recover.

TURNER B. concurred.

Rule discharged.

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DOE *d.* BEARD *against* ROE.

A notice to a tenant by a landlord, under the 1 *G. 4. c. 87. s. 1.*, signed "A. B. agent for the plaintiff," is sufficient.

So it is sufficient where it requires the tenant to appear and be made defendant and to find bail, "and for such purposes as are specified in the act of parliament," without stating those purposes.

**G**ASELEE had obtained a rule *nisi* to rescind an order made by *Gurney B.* at chambers, whereby the declaration and notice given in this ejectment, pursuant to the 1 *Geo. 4. c. 87. s. 1.*, had been set aside for irregularity.

*Mansel*, in showing cause, took a preliminary objection, that there was no affidavit of what passed before the learned baron at chambers, the rule having been granted on the statement of counsel alone. He contended, that in the absence of such affidavit the only questions which could be raised were, whether the learned judge had jurisdiction, and whether the order on the face of it was legal; and that on neither of those points could any objection be supported. It was admitted by *Gaselee*, that the object of the rule was solely to discuss the sufficiency of the notice, and it was therefore, on the ground taken by *Mansel*,

Discharged without costs.

A fresh rule having been obtained on a proper affidavit,

*Mansel* showed cause. This notice of declaration is incorrect. The landlord is the party by whom the notice is to be given. By the act, the demand of possession may be made by the landlord or his agent, but it uses the word "landlord" alone with reference to the notice; consequently the legislature makes a distinction between the two cases. [*Parke B.* Do you contend that the landlord must serve the declaration in person? The word "landlord" does not bind him to

to the act himself.] At any rate, if he may give the notice by an agent, it should be so stated; here the notice is signed "A. B., agent for the plaintiff," whereas it ought to have been "agent for the lessor of the plaintiff," or "for the landlord." A party seeking a remedy under so penal an act as the present should follow its provisions strictly. [*Parke B.* It is quite sufficient if there is a notice addressed to the tenant to appear and be made defendant, and find bail pursuant to the statute. Can there be a doubt that such a notice has been given here?] Secondly, the notice is defective in not stating the purposes for which the tenant is to appear. By the act, the party is to appear to be made defendant, and find bail, if ordered, and "for such purposes as are hereinafter next specified;" namely, that he may be ruled to enter into the undertaking and recognizance specified in the statute, or, in default thereof, that judgment may be entered up for the plaintiff. The notice ought consequently to give the tenant full information as to what he will be required to do; whereas the present notice merely calls on him to appear to be made defendant and to give bail, "and for such purposes as are specified in the act of parliament." [*Alderson B.* If he looks at the act he will see what the purposes are.] It is not probable that the persons to whom these notices are usually addressed will be able to refer to the statute.

*Gaselee contra.* This notice is taken from the precedent given by Mr. *Tidd* (a). The landlord will be obliged to move again, and then the rule *nisi* will give the tenant full information as to what he is to do, and will state the penalty he will incur by standing out.

(a) *Tidd's Forms*, p. 189, 6th edit. It is followed however by a more verbal form, setting out all the proceedings under the act.

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PARKE B.—It seems to me that this notice is sufficient. I do not see what advantage the tenant would derive from knowing all those other matters in the first instance.

ALDERSON B.—The knowledge of those matters would not assist the party, he will receive the information in sufficient time afterwards. In order to contend that a more explicit notice should be given, it should be shown that it would be more advantageous to the tenant than the present form.

Rule absolute.

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THOMAS, Executor, *against* EDWARDS (a).

In an action by the executor of an innkeeper against the chairman of the committee of a candidate at a contested election, for refreshments supplied to voters, but which were directly ordered by a third person, one M.: Held, that before the plaintiff could recover, he was bound to prove that M. was employed by the defendant

alone, or by the defendant and others, to give the order, and that the defendant in so employing M. was not acting as agent for any other person, or else that M. was not a mere agent, but acted jointly with the defendant, or with the defendant and others; and that it would make no difference that the plaintiff's testatrix considered M. as authorized to contract on behalf of the candidate, if the fact was not so.

ASSUMPSIT by the plaintiff, executor of one *Mary Thomas*, deceased, an innkeeper at *Haverfordwest*, for refreshments supplied by her to voters during the contested election for the county of *Pembroke* in 1831. Plea: the general issue. At the trial before *Patteson J.* at the *Pembrokeshire* summer assizes, 1835, the following facts appeared in evidence.

The defendant was chairman of the committee of Mr. *Greville*, one of the candidates at the election in question. On the day before the day of nomination, a person called *Miller* offered his services to the committee, to be employed as they thought proper in promoting Mr. *Greville's* cause. On the following morning a meeting of that gentleman's friends took place at the

(a) This case was decided in *Hilary term*.


house of a Mr. *Harvey*, the agent of the defendant's father. *Miller*, who was present, was informed that he would be required to superintend the public-houses to be opened for the voters in Mr. *Greville's* interest, and he was furnished with a list of public-houses, and directions as to the terms on which refreshments were to be supplied to the electors, who were not to be served without producing a ticket. Acting on his instructions, *Miller* opened a number of public-houses, and among others that of the testatrix, and made the necessary arrangements. *Miller*, who was examined at the trial, could not swear that the defendant was one of those from whom he received his orders, or that the defendant was present when they were given; but stated that he saw the defendant in the course of the same morning, who said, "If you have any difficulty, come to me." At a subsequent period of the action, the regulation as to tickets having been infringed, *Miller* informed the defendant of it, who replied, "Well, we must stand shot for to-day." Mr. *Harvey*, who acted as clerk to the committee, was also called, and he proved, that whenever matters of finance were discussed in the committee, Mr. *Greville* was requested to withdraw. The learned judge told the jury, that, before finding for the plaintiff, they must be satisfied that the defendant meant to make himself personally liable. The jury having found their verdict for the defendant, *E. V. Williams*, in the following Michaelmas term, obtained a rule to show cause why there should not be a new trial, on the ground of misdirection.

In Hilary term *Chilton* showed cause, and *Williams* and *James* were heard in support of the rule. The court took time to consider, in order to consult the learned judge who tried the case as to the way in which he had left it to the jury. The judgment of the court was in the course of the same term delivered by

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PARKE B. (After stating the nature of the action and the facts of the case, his lordship proceeded thus.)— It was alleged by the learned counsel in support of the rule, that this case was left to the jury, on the question whether the defendant meant to pledge his personal credit; and on the other side it was contended, that it was not put to the jury in that form, which is a mixed question of law and fact. We have spoken to the learned judge, but he has no distinct recollection of the manner in which he left the case to the jury. He thinks he did not leave it to them in the form suggested, but that he made an observation to that effect during the progress of the cause, which might mislead them. He therefore concurs with the court in thinking that there ought to be a new trial. To prevent misapprehension, we have put some observations into writing with respect to the questions that ought to be submitted to the jury. The plaintiff must prove that there was an express contract, or a contract implied, between the defendant and the plaintiff's testatrix, to pay for the meat and drink supplied by her to the voters. The burthen of proof is on the plaintiff. The first question will be, whether *any contract* at all was entered into by any one with the plaintiff's testatrix. If she supplied the meat and drink to the voters, on a mere speculation that the candidate, or some other person interested in the election, would, as a matter of honour, pay for them, no contract was thereby created with any one; but if she supplied them by the order of another, looking to be paid for them as a *matter of right*, a contract would be implied. On the supposition that a contract was entered into, the next question is, with whom was that contract made? The voters were certainly not contracting parties. *Miller*, the person who gave the order, was *primæ facie* the contracting party with the plaintiff's testatrix; but if the plaintiff shows that



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*Miller* was acting as the agent of another in giving that order, the principal is the person ordering, in point of law, and therefore the contracting party. If, then, it is proved that *Miller* was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant himself was not acting in so employing *Miller* as agent for any one else, then the defendant is the principal, and is liable; whether he intended or not to pledge his personal responsibility, he is responsible if he be a principal, and he is so, unless he be agent for another. The same consequence will follow if *Miller* was not a mere agent, but acted jointly with the defendant, or with the defendant and others, in giving the order. If it should appear that the testatrix considered *Miller* as acting on behalf of the candidate, and trusted him by supplying goods to the voters, on the supposition that he was authorized to contract on behalf of the candidate, it would make no difference, although the contract with the candidate would have been illegal; for on proof by the plaintiff that *Miller* was not so authorized, the plaintiff would establish that the contract was not with the candidate, though the testatrix supposed it to be; and there would, therefore, be no illegality in the contract *actually* made; and no policy of the law would prevent an action being brought upon it. If indeed the meat and drink were supplied by the testatrix, *with a view to induce* the electors to vote for a particular candidate, the contract actually made would be illegal; but of this there was no sufficient evidence in this case; and if there had been, such a defence would not have been admissible under the plea of *non assumpsit* since the new rules. In addition to the cases of *Piel v. Hodgson* and *Railton v. Hodgson* (a), cited on the argument,

(a) Stated in the argument in *Paterson v. Gandasequi*, 15 East, 67.

(a) Holt, 309.

END OF EASTER TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

**Trinity Term,**

THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.



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IN the first day of this term ALDERSON B. declared the rule of practice to be, that the arguments of *London* and *Middlesex* new trials moved within the first four days of a term, take precedence of country new trials moved within the same period, but not of other country new trials, the rules in which were granted the previous term.

Order in which arguments on new trials are taken.



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DICKEN *against* NEALE.

Debt for 20*l.* for a boat sold and delivered by the plaintiff to the defendant. Pleas, first, *nunquam indebitatus*; secondly, as to 17*l.* 10*s.* parcel of the said sum of 20*l.*, that the action as to the said sum of 17*l.* 10*s.* was brought to recover that sum, as being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 10*l.* was parcel; such sum of 57*l.* 10*s.* being the price of the said boat sold and delivered by the plaintiff to the defendant: that the plaintiff at the time of the sale warranted that the boat was sound, and that the defendant confiding in such promise bought it on the terms aforesaid, and then paid to the plaintiff the sum of 40*l.* in part and on account of the boat. The plea went on to aver, that the boat at the time of the sale and warranty was unsound, and was not then worth more than the 40*l.* *which had been and was so paid to the plaintiff for the same*; and that the defendant incurred above 17*l.* 10*s.* expense in putting her into a sound state. Held, that as this plea showed that the plaintiff had never been indebted to the defendant in more than the difference between the 40*l.* and the real value of the boat, the 40*l.* having been paid contemporaneously with the purchase of the boat, the plea was bad on special demurrer, as amounting to the general issue.

**D**EBT. Common counts for 20*l.* for the price of a boat bargained and sold by the plaintiff to the defendant; for 20*l.* for a boat sold and delivered by the plaintiff to the defendant; and for 20*l.* on an account stated. Pleas, first, *nunquam indebitatus*; secondly, as to 17*l.* 10*s.*, parcel of the sum of 20*l.* in the second count, *actionem non*, because the defendant says, that this action as to the said sum of 17*l.* 10*s.*, parcel &c., is brought to recover of him, the defendant, the said sum of 17*l.* 10*s.* parcel &c., as and being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 20*l.* in the second count mentioned is parcel, such sum of 57*l.* 10*s.* being the price of the said boat in the said count mentioned, sold and delivered by the plaintiff to the defendant; and the defendant further saith, that at the time of the sale of the said boat to him by the plaintiff, he, the plaintiff, warranted and promised to the defendant that the said boat was sound and reasonably fit for use, and that the defendant, confiding in the said promise of the plaintiff, did then buy the said last-mentioned boat of the plaintiff on the terms aforesaid, and then paid to the plaintiff divers monies, to wit, to the amount of 40*l.*, in part and on account of the said boat; and the defendant further saith, that the said boat at the time of the sale thereof to him, and the making of the promise of the plaintiff, was not sound or reasonably fit for use, but on the contrary was, then,

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and until the defendant incurred the expense after mentioned, unsound and unfit for use, by reason whereof the said boat then became and was of little or no use or value to the defendant; and the defendant further saith, that the said boat, by reason of its being unsound and unfit for use as aforesaid, was not at the time of the said sale and promise reasonably worth more *than the said sum* of 40*l.*, which *had been and was* so paid to the plaintiff for the same, and the reasonable price and value thereof by reason of the said breach of warranty then was less than 40*l.*, and the defendant then incurred great expense, to wit, an expense exceeding the said sum of 17*l.* 10*s.* parcel &c., in putting the said boat in a sound state, and rendering the same fit for use. Verification.

Special demurrer, assigning for cause that the above plea amounted to the general issue.

*Ogle*, in support of the demurrer. *Cousens v. Pad-don* (a) shows that this plea, which professes to be in confession and avoidance, does in fact amount to the general issue, and is therefore bad on special demurrer. If there was such a special contract for sale and warranty of the boat in question as is pleaded, the plaintiff could give no evidence on the general *indebitatus* count, and could only recover on the *quantum valebat*. [Lord Abinger C. B. You say that the defendant himself shows by his second plea, that the plaintiff could only recover on a *quantum valebat*, so that the defence was open on the general issue. But is not this a sort of special plea of payment?] No, for the sum in dispute is not the whole purchase-money of 57*l.* 10*s.*, but only the balance of 17*l.* 10*s.*; so that the defendant is not put to plead payment of the 40*l.*, and

(a) 5 Tyr. 535, 546.

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does not try to discharge himself of more than the 17*l.* 10*s.*

*Archbold* supported the plea. The implied contract of bargain and sale laid in the declaration, is, in part, admitted by the special plea. [Lord *Abinger* C. B. No, it states the real contract, which appears to have been special, with a warranty differing from that which would be implied from the *indebitatus* count relied on.] The plea was necessary as here framed, because though the defendant could give in evidence upon the plea of *nunquam indebitatus*, that the boat was sold for a stipulated price, he could not prove that that stipulated price was 57*l.* 10*s.*, of which sum he had paid 40*l.*; for that would be an admission that he had been indebted to the plaintiff on, at least, part of the contract which forms the cause of action. *Cousens v. Pad-*  
*don* is beside this case.

*Ogle* in reply. [Lord *Abinger* C. B. The declaration claims 20*l.* for the price of a boat sold and delivered. The plea says, I owed you only the value of a boat, 40*l.*, which I have paid you. My difficulty is, whether this is not in truth a plea of payment of 40*l.*] The demand is for 17*l.* 10*s.* only, and the plea amounts to a statement that the plaintiff has no cause of action at all for that sum on the *indebitatus* count. How can the plaintiff take issue on the plea? To traverse the warranty is to admit that the boat was only worth 40*l.*, and to take issue by alleging it to be worth more than 40*l.*, is to admit the warranty. As the action is not for 57*l.* 10*s.*, but for 17*l.* 10*s.* only, the defendant was not bound to plead payment of the 40*l.*; but if he was, *Cousens v. Pad-*  
*don* is in point; for in that case there had been a payment in respect of the claim on the *quantum meruit* of a smaller sum than appeared to be due on account of the

plaintiff's claim for bricks, of a smaller sum than appeared to be due for them on the *quantum valebant* found by the jury. [*Gurney* B. Suppose the plea to have omitted the allegation of payment, and that the plaintiff at the trial had proved the defendant's contract to buy the coat for 57*l.* 10*s.*, could the defendant have proved the part payment of 40*l.* ?] It would not have been necessary to plead or prove such payment, for the particulars of demand must have been for the balance of 17*l.* 10*s.* only, thus giving credit for the 40*l.*, *Coates v. Stevens* (a). But if the particulars cannot be incorporated with the declaration for the purposes of pleading to the latter, still the declaration, by going for 20*l.* only, shows that no claim beyond that sum could be set up, and the introductory part of the plea in question confines the action to 17*l.* 10*s.*, the real sum in dispute ; and if it had been brought for 57*l.* 10*s.* the plea would be bad on general demurrer, on the ground that it had narrowed the issue to a lesser sum than was demanded.

Lord ABINGER C. B.—In *Cousens v. Paddon* a specific contract was proved to furnish bricks at a fixed price per thousand ; and it became a question whether, on a plea of *nunquam indebitatus*, the defendant could show that the goods furnished were of inferior quality, so as to reduce the sum payable by him in respect of them, down to that which they were really worth—an amount which was pleaded to have been paid to the plaintiff by the defendant. All that the court there held was, that where a plaintiff is precluded by the general form of his declaration from giving evidence of a special contract for sale of goods, and can only prove the actual value of the articles delivered, the defendant having accepted them, may plead and give evidence the payment of that actual value. Now

(a) 5 Tyr. 764.

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that he was not at one time indebted 40*l.*, and that he, therefore, could not be *of nunquam indebtedatus*. But the plaintiff says that the defendant bought the boat of the plaintiff, that is, contemporaneously, paid the price of the boat, and on account of the boat, saying, that the boat was not, at the time of purchase, and promise, reasonably worth more than 40*l.*, which *had been and was* so paid for the same: then as the plea clears the defendant was ever indebted in the cause he paid that sum before or at the time he bought the boat, and states that he is not indebted to the plaintiff in more than 40*l.* between that sum and the real value of the boat amounts to the general issue, and is the special demurrer.

BOLLAND and GURNEY B*arons* concur.

(s) See *Jones v. Nanney*, ante.

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DOE dem. SPENCER *against* PEDL

A testator

TRUSTEESMENT Issues having been



following case, framed by consent of parties under  
 judge's order in pursuance thereof.

by indenture of the 9th of *October* 1804, made be-  
 en *Edward* Earl of *Derby*, of the one part, and  
 in *Spencer* of the other part, the premises in ques-  
 were demised and granted unto the said *J. Spen-*  
 , his heirs and assigns, for the lives of three persons  
 rein named, and for the life of the survivor of them,  
 the heirs male of *Thomas*, first Earl of *Derby*, of  
 name of *Stanley*, should so long continue subject  
 the rents, covenants, and agreements therein ex-  
 cused.

Livery of seisin was duly made to the said *J. Spen-*  
 , who thereupon entered into and took possession of  
 full premises, and was thereof seised and possessed  
 the said term until and at the time of his death.

After becoming, and whilst seised and possessed as  
 resaid, namely, on the 25th *December* 1820, the  
 l *J. Spencer* made his will, executed and attested as  
 y law required for passing estates *pur autre vie*, of  
 ch will the following is a facsimile copy :—

This is the last will and testament of me, *J. Spen-*  
 of *Redvales*, within *Bury*, in the county of *Lan-*  
 ter, gentleman, made whilst in health and of sound  
 disposing mind, memory, and understanding, in  
 mer following :—First, I do hereby direct my exe-

---

not before disposed of, to his wife, her heirs, executors, administrators, and as-  
 s for ever. He afterwards added these clauses just before he executed it, " I  
 urther give to my wife this house wherein I now live ; also the cottage, and all  
 buildings, cattle, and every thing belonging to me in and about the house, *Red-*  
 . I also entail my land to the *Spencer's* male heir so long as one shall remain."  
 l, that the devise to the wife of the residue of the land was not affected by the  
 equent devise of *Redvales* to her for life, or to the *Spencer's* male heir, though  
*Redvales* property was held by the testator *pur autre vie* only ; and that the two  
 es might both stand together, not being necessarily inconsistent ; but that the  
 clause as to the entail of the devisor's land, was either unintelligible or inap-  
 ble to the *Redvales* property devised to the wife.

Where a clause in a will is struck through by the testator before the will is exe-  
 cuted, the erasure can only be noticed as a fact, and the will must be read as if the  
 clause had never been in it.

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cutors hereinafter appointed to pay off and discharge all my just debts, my funeral and testamentary expenses, and the costs of the probate and execution of this my will, out of my personal estate. And if my personal estate should be insufficient for that purpose, I charge my real estate with the payment of such deficiency: and subject as aforesaid I do hereby give and devise to my nephew *John Spencer*, otherwise *Holt*, the natural son of my sister *Betty*, and to his heirs and assigns, [all that cottage or dwelling-house in which he now resides, situate in *Redvales* aforesaid, for and during the term of the natural lives by which I hold the same under the Earl of *Derby*, to enter thereupon from the day of my decease; and I do hereby also (a)] give and bequeath unto the said *J. Spencer*, otherwise *Holt*, and to my brother *James Spencer*, all those messuages, cottages, or dwelling-houses, with the appurtenances to the same respectively belonging, situate at *Bedlam Green*, within *Bury* aforesaid, to hold the same unto the said *John Spencer*, otherwise *Holt*, and *James Spencer*, their executors, administrators, and assigns, equally as tenants in common, to enter thereupon immediately after my decease. And I do hereby also give and devise unto *Alice Cheetham*, wife of *Moses Cheetham*, of *Heywood*, all that messuage or dwelling-house, with the shop and appurtenances to the same belonging, situate in *Heywood* aforesaid, formerly in my occupation, on condition that she pay unto my wife, *Ann Spencer*, the sum of 100*l.*, which I direct she shall pay before she enters there-

(a) The words between brackets were admitted by the case to be scored through in the original will, and were admitted by the case to have been so scored through or struck out by the testator immediately before he executed his will, and to describe the premises in question, subject to the question of the admissibility of any evidence to this effect to affect the construction of the will.


on; which sum of 100*l*. I give to my wife for her use, to hold the same unto the said *Alice Cheet-*  
*m*, her heirs and assigns for ever, on such condition  
 aforesaid; and in case she shall refuse to pay the  
 me, then I give and devise the said messuage, shop,  
 premises to my wife, her heirs and assigns; and I

hereby authorize and empower my wife, by will or  
 her disposition, to give or dispose of the sum of  
 £. at her death, in such way and manner as she may  
 think proper, the same to be paid and discharged out  
 my personal estate; and if I should not have so  
 much money or securities for money at my death, then  
 to hereby charge my messuages, buildings, and pre-  
 mises, situate at *Wrigley Brook*, within *Heywood* afore-  
 said, with so much as my personal estate, not including  
 household goods and furniture, shall fall short.  
 and I do hereby give and bequeath unto my wife all  
 singular my household and other goods and furni-  
 re, beds and bedding, plate, linen, and china, to and  
 her own use and benefit absolutely. And I do  
 hereby also give and devise all those two messuages or  
 dwelling-houses, with the buildings, lands, and pre-  
 mises thereto belonging, situate at *Cut Yale*, within  
*Wetland*, to my wife, for and during the term of her  
 natural life. And in case my nephew, the said *J.*  
*Spencer*, otherwise *Holt*, should survive my wife, then  
 immediately after her decease I give and devise the  
 same to the said *J. Spencer*, otherwise *Holt*, and his  
 assigns, for and during the term of his natural life.  
 And immediately after the decease of the survivor of  
 my said wife and nephew, I do hereby give and  
 devise the same unto and equally to be divided amongst  
 the children of my said nephew, share and share  
 alike, and their respective heirs and assigns, as tenants  
 common. And in case he should die without lawful  
 issue living at his decease, I do hereby give and devise

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the same unto and equally to be divided amongst all and every the sons of my brother *J. Spencer*, and to their respective assigns, during their several natural lives. And after the decease of the sons of my brother *James*, and as they shall respectively die, I give and devise the part and share, parts and shares of such of them so dying, unto and equally to be divided amongst all and every the children of my nephews, share and share alike, as tenants in common. And I do hereby also give and devise unto my wife *Ann Spencer*, all those several messuages or dwelling-house, situate at or near *Wrigley Brook*, within *Heywood* aforesaid, with all and every the outbuildings, gardens, lands, and premises to the same belonging, for and during the term of her natural life; and immediately from and after her decease, I hereby give, devise, and bequeath the same, subject to the eventual charge thereupon as hereinbefore mentioned, unto my natural son *James Ogden*, otherwise *Spencer*, for and during the term of his natural life. And immediately after his decease, I give and devise the same unto my nephew the said *J. Spencer*, otherwise *Holt*, in case he shall survive the said *James Ogden*, otherwise *Spencer*, for and during the term of his natural life, and after the decease of the survivor of them the said *James Ogden*, otherwise *Spencer*, and *John Spencer*, otherwise *Holt*, then I do hereby give, devise, and bequeath the same unto and equally to be divided among the children of the said *John Spencer*, otherwise *Holt*, lawfully to be begotten, if more than one, share and share alike, and if only one, then the whole to such only child, and his or her heirs, executors, administrators, and assigns, during my estate and interest therein. But in case the said *J. Spencer*, otherwise *Holt*, should die without leaving lawful issue, or in case of his leaving such, who should die under age, without

lawful issue, then after the decease of the said *James Ogden*, otherwise *Spencer*, and *John Spencer*, otherwise *Holt*, and the issue of the said *J. Spencer*, otherwise *Holt*, in manner aforesaid, then I do hereby give, devise, and bequeath the said messuages, buildings, lands, and premises, situate at or near *Wrigley Brook* aforesaid, unto and equally amongst all and every the sons of my said brother *James*, during their respective natural lives. And immediately from and after the decease of any of them, and as they shall respectively die, I do hereby give, devise, and bequeath the part or share, parts or shares of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, administrators, and assigns, as tenants in common. And I do hereby also give and devise to my wife and her assigns, for and during the term of her natural life, all that messuage, farm, and tenement, with the cottage, outbuildings, and other appurtenances to the same belonging, called *Gorsey Hill*, situate in *Heywood* aforesaid, which I lately purchased from *Edward Monday*; and immediately from and after her decease I do hereby give and devise the same to my natural daughter *Mary Ogden*, otherwise *Spencer*, for and during the term of her natural life. And immediately from and after the decease of the survivor of them my said wife and *Mary Ogden*, otherwise *Spencer*, I do hereby give and devise the same unto and equally amongst all and every the sons of my said brother *James*, during their respective natural lives. And from and after the decease of any of them, and as they shall respectively die, I do hereby give, devise, and bequeath the part or share, parts or shares of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, administrators, and assigns, as te-

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nants in common. And I do hereby also give and devise unto my wife and her assigns, during the term of her natural life, all that my messuage, cottage, or dwelling-house, with all its appurtenances, situate at *Dawson Fold*, within *Heywood* aforesaid; and immediately after her decease I give and devise the same unto my wife's niece, *Elizabeth Pedley*, and her assigns, for and during the term of her natural life; and immediately from and after the decease of the survivor of them, my said wife and *Elizabeth Pedley*, I do hereby give, devise, and bequeath the same unto and equally to be divided amongst all and every the sons of my said brother *James*, during their respective natural lives: and from and after the decease of any of them, and as they shall respectively die, I do hereby give and bequeath the part and share, parts and shares of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, and administrators, as tenants in common; and all the rest, residue and remainder of my messuages, buildings, lands, hereditaments and premises, and all my personal and other estate and effects not hereinbefore disposed of, I do hereby give, devise, and bequeath unto my wife, *Ann Spencer*, her heirs, executors, administrators, and assigns for ever, or for and during all my estate, right, title, and interest therein. [I do further give to my wife this house wherein I now live, also the cottage and all the building, cattle, and every thing belonging to me in and about this house, *Redvales*. I also make my wife sole executor, and at her decease my cousin, (the word "cousin" was scored through horizontally in the original), *James Spencer*. I also entail my land to the *Spencer's male heirs* (a), so long as one shall remain (b).]

(a) The letter s in heirs was struck through in the original with a down stroke.

(b) The words within brackets were inserted by the testator in his own

The testator died on the 27th of *December* 1820, without altering or revoking his said will, and the said *Ann Spencer*, his widow, therein named, and who survived him, proved the said will, and entered into and until her death remained in possession of the premises in question. On the 14th of *March* 1834, she made her will, which was duly executed and attested, and contained, amongst other, the following words:— “ I give and devise unto my brother *James Ainsworth*, and my nephew, *J. T. Pedley*, all my estate and interest in the messuages and premises which I now occupy at *Redvales*, and the cottage, buildings, and appurtenances thereto given to me by the will of my late husband, for their own absolute use and benefit.”

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In *October* 1835, she died, without having altered or revoked her said will, and leaving her surviving the said *James Ainsworth* and *James Thomas Pedley*, in her will named as aforesaid, and who are the above-named defendants.

*George Spencer*, the lessor of the plaintiff, is the heir at law and next of kin of the testator *J. Spencer*, one of the *cestui que vies* named in the indenture, is still living, and the heirs male of *Thomas*, first Earl of *Derby*, of the names of *Stanley*, still continues.

The question for the opinion of the court was, whether the said *Ann Spencer*, under the will of the said testator *J. Spencer*, took the whole estate and interest which he had in the premises in question.

The following were the points stated in the margin of the demurrer book.

It will be contended for the lessor of the plaintiff, that the express demise of the particular premises in question to the wife, excludes those premises from the

hand, immediately after striking out the words struck out in the first part of the will, (see p. 884,) and before executing the will, and describe the premises in question.

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operation of the general devise of residuary estate, and that the wife, as to the premises in question, did not take any estate or interest extending beyond her own life time.

It will be contended for the defendants, that *Ann Spencer*, the wife of the testator, took the entire interest of the testators in the premises in question, under the general devise to her of the residue of the estate.

*Cresswell* for the lessors of the plaintiff. *Ann Spencer*, the widow of the devisor, having died, living the last of the *cestui que vies*, *George Spencer*, the heir at law of the devisor, took *Redvales* as special occupant; for as the specific devise of it to the widow contained no words of inheritance, she took an estate for her own life only, *Doe d. Jeff v. Robinson (a)*. For nothing appears on the face of the will to disclose any clear intention that she should take a greater estate; and the residuary clause has not that effect, for at the time it was inserted, the devisor's whole interest had been devised to *John Spencer*. [Lord *Abinger* C. B. We shall construe the will as if the clause containing the previous devise had never been in it, and can only take notice of the erasure as a fact. *Parke* B. The question before us is, what is the meaning of the words left on this paper at the time it was signed?] May not the clause thus struck out be considered as *cotemporanea expositio* of the testator's intention? *Strickland v. Maxwell (b)*. [Lord *Abinger* C. B. You could only give it in evidence as explaining a latent ambiguity. *Parke* B. It is immaterial what the devisor meant at an earlier period. The question is, what he intended at the time he signed the will. To ascertain that, treat

(a) 8 B. &amp; Cr. 296.

(b) 4 Tyr. 346.



the erased part of the paper as if it was a blank.] The rule laid down in *Sheppard's Touchstone* (a) is, that in testaments the last will is of the greatest force; so that if, as in this case, the residuary clause is repugnant to the subsequent clause specifically devising to the wife, the last must prevail, *Sims v. Doughty* (b), *Constantine v. Constantine* (c). Putting out of consideration the residuary clause, *Doe v. Robinson* shows that only an estate for life passed; but supposing it to have effect at all, it would pass the whole interest, which is inconsistent. There are cases in which an estate for life having been devised in the first part of a will, and an estate in fee having been afterwards given by a residuary clause, the clauses have been held not inconsistent, and the former clause to be reasonably enlarged by the latter; but they turn on this, that the testator, by the latter clause, goes on to dispose of more than he had previously given, viz. what he had not before parted with. But no decision shows that where the clauses in a will are placed in the order here adopted, viz. the residuary clause giving an estate in fee first, and the clause specifically giving an estate for life only to the same person last, the first can have effect. [Lord Abinger C. B. We are to give effect to the whole will, if possible. It is only where the clauses are necessarily inconsistent, that the first must be rejected, in order to make way for the last.] To give effect to both clauses *Redvales* must not be held to pass under the first, viz. the residuary clause, or the clause of specific devise can have no effect; whereas if the latter passed an estate for life to the widow, the residuary clause would have

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(a) By *Preston*, p. 402.

(b) 5 *Ves.* 243.

(c) 6 *Ves.* 100, and see *Doe d. Biggs v. Lawrence*, 2 *Taunt.* 113; *Garland v. Leonard*, 1 *Swanst.* 161; 1 *Wilson's Ch. Cas.* 129, S. P. Cum duo inter se pugnantia reperiuntur intestamento, ultimum ratum est, Co. Lit. 112 b. cited 2 *Marsh.* 420; and see references, *id.* note (a).

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effect as to any other property of the devisor; and no intestacy would be occasioned by the special occupancy, for by a still later clause the testator has entailed it on his own male heir by words apt for that purpose; *Doe d. Garrod v. Garrod* (a), *Counden v. Clarke* (b).

Besides the latter clause, "I also entail *my land* on the *Spencer's* male heir so long as one shall remain," is inconsistent with the previous residuary devise in fee to the widow, for it applies to all that has preceded. [*Parke B.* You contend that "my land" must mean the whole of the devisor's real property, so that he would give his widow an estate for life, and then an estate tail to his heir. That would revoke every devise except that to the widow and the "*Spencer's* male heir," the lessor of the plaintiff. Can you make sense of that devise? Does it mean the devisor's own heir male, or the heir male at the head of the family?] There is no proof that the devisor was not the elder brother, or that he was not the head of the family. [*Parke B.* Then being a *Spencer* he must be taken to mean his own heir male, though it might be otherwise if he had not been a *Spencer*, or had there been a doubt which of several classes should take, as in *Doe d. Winter v. Perratt* (c).]

*Coltman* for the defendant. The last clause in the will being now set up to defeat the preceding residuary clause, it may be more conveniently considered before the point first argued. There are two objections to the argument, founded on it by the lessors of the plaintiff. First, it is a devise of "my land," without more; thus leaving it *in dubio* what land was meant: and, secondly, it is uncertain what person is to take.

(a) 2 B. &amp; Ad. 87.

(b) Hobart, 29.

(c) 5 B. & Cr. 48; and see *Doe v. Easley*, 5 Tyr. 450.

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On the first point, a "house and cottage" to the widow, is not affected by the last clause, for though a devise of "land" will in general carry buildings then on it, that is only so where the word "land" has not been used in contradistinction to the word "houses." Thus in *Jarman's* edition of *Powell on Devises*, vol. ii. 186, it is said, "But though the word 'lands' will, unaided by the context, carry houses, or rather the land on which the houses are built, yet of course this does not hold where the testator evidently uses it in contradistinction to 'house.' As where a deviser having a messuage at *L.*, and a messuage and lands at *W.*, devised his house at *L.*, with all other his lands, meadows, pastures, with their appurtenances, lying in *W.*, the house at *W.* was held not to pass." The authority for that is *Ewer v. Haydon* (a). Now in this case the testator has always made the distinction between houses and land, devising houses when he meant houses, and land when he meant land. [*Parke B.* The case does not find in terms, whether the testator had any land independent of that which he had before specifically devised.] That is so, but the last clause cannot embrace "houses" previously given; and if it could, it is too uncertain to prevail. Secondly, as to the uncertainty of what party is to take as heir in tail, the words "the *Spencer's* male heir" might mean the deviser's nephew, the son of *James Spencer*, or any other of the *Spencers*. [*Parke B.* It stood originally "male heirs," but the *s* is struck out. Lord *Abinger C. B.* He perhaps meant (had it been possible) to restrict the fee given to the children of his brother, and prevent them from alienating. Mr. *Cresswell's* construction would revoke nearly all the will except the last clauses.]

It is a fallacy to argue that the residuary clause and

(a) Moore, 359, pl. 491; 2 Anderson, 123; Cro. El. 476, S. C.

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the specific devise are inconsistent, because the specific devise comes last; for the objection is narrowed to that. But as they might confessedly stand together had their order in the will been reversed, so they may now; for the alleged inconsistency is not absolute and actual on the face of the will, as it would have been had the latter devise been in terms to the widow for life, but constructive only; *Doe d. Jeff v. Robinson* is only a legal construction of a devisor's intention in that case. In no previous instance has a residuary clause been held to be cut down by a subsequent specific devise of a smaller estate. In the second vol. of *Powell on Devises*, as edited by *Jarman*, ch. 6, p. 102, the general rule drawn from all the cases there cited is, that all a testator has, which is not otherwise disposed of, passes under the residuary clause, unless it appear from other parts of the will to be his clear intention that the ultimate remainder should not pass. So in *Doe d. Moreton v. Fossick* (a) it was argued, that where an estate is particularly disposed of in a will, the reversion of it will not pass by a general residuary devise in the same will, provided there is something else which passes to satisfy the general words; but Lord *Tenterden* said, "that the more modern doctrine is, that where the words are large enough to carry a remote reversion it will pass, unless there be something directly showing the intention to have been otherwise. The negative must be proved." Now no such intention here appears, except the testator could be taken to have been acquainted, *à priori*, with the law pronounced several years afterwards in *Doe v. Robinson*.

*Cresswell* in reply. In *Ewer v. Haydon* the testator clearly meant that the house should not go with the

(a) 1 B. & Adol. 188.

land, the words being used in contradistinction to each other. There is no such feature in this case, and the general rule applies. Nor is the devise to the “*Spencer’s* male heir” inconsistent with the previous devises of estates tail to the devisor’s nephew’s heirs male, for they are to take only for life, and their children as tenants in common in fee; and the devisor might have changed his mind as to frittering away his property in small parcels; and he might have intended to give his land to the male heir of his own family. Unless the last clause be wholly insensible, it must prevail over the former disposition. Nor can the life estate which the widow would take under the specific devise, be enlarged by any words which precede, and do not succeed it. Then the clauses are necessarily inconsistent, the last must prevail, and that construction be referred to the testator’s change of intention.

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LORD ABINGER C. B.—My opinion is, that the defendants are entitled to retain this estate of *Redvales*. My hesitation has arisen on the last clause, for had it shown the testator’s intention to give his estate to his heir male in terms so clear that we must have given effect to them, there would have been great difficulty, as it would have been inconsistent with all the other specific estates given by the will, and, coming last, must have had the effect of destroying them all. But it appears to me not to be sufficiently intelligible and clear to call on us to give it effect: for, first, there is no sufficient *designatio personæ*, as the “heir male of the *Spencers*” may mean his own heir male, or his brother’s, or the heir of some other family of the same name. That is too ambiguous. It is probable that he thought, and erroneously, that after giving the property to his nephews in the way he did, he could still restrain them

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from alienating it. As to the question which, though first mooted, has taken the second place in the discussion, viz. whether the latter clause devising *Redvales* to the wife, and which, if it had stood alone, would have only passed an estate for life to her, is so necessarily inconsistent with the previous residuary clause, which gave her the fee, as to be a revocation of it,—the plaintiff's argument in the affirmative seems to me founded on this fallacy; no doubt the general rule is, that where a testator makes a particular devise, and afterwards, in a subsequent clause, adds another clearly repugnant to the first, the latter must prevail: but that rule only applies where the testator's intention is clearly apparent from the words of his will. When the courts hold that a devise to a person, without more, passes only an estate for life, they act on a rule of construction adopted to avoid all questions respecting the intention of the testator. In many cases of that class the testator meant to give his whole interest, but having failed to do so by express words, the rule of construction has prevailed so as to pass an estate for life only. Then we cannot here infer as of necessity, that the deviser intended to give his widow less than his whole interest in *Redvales*, as he had done by the previous clause. He may have inserted these latter words to show his intention to give her the whole, which he might think he had not accomplished by the residuary clause; therefore, though the repetition was unnecessary, still there is no inevitable inconsistency in first giving *Redvales* to her and her heirs, and then giving it to her again without more words; though the latter grant would by construction of law be for a limited estate only. Nor is there any decision that such devises in the order in which they here occur, are necessarily incompatible or repugnant. We are bound to

give effect to all the clauses, if possible, and it does not follow from the latter devise to the widow that the testator meant to revoke the residuary clause.

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PARKE B.—I entirely concur with my lord chief baron, that the defendant is entitled to judgment. The first question is, whether the words “I entail my lands on the heirs male of the *Spencers*,” makes any difference in the will. There is great difficulty in saying what is meant by the words “my land,” and “the *Spencer’s* male heir.” It is sufficient for us to say that they are either void as unintelligible and insensible, or immaterial for not referring to *Redvales*, which had been before devised to the testator’s widow. Unless *Redvales* be clearly included in the words “my land,” those words can have no effect on our decision. Whether they limit the estates previously given to the nephews is not necessary to decide. The remaining question is, whether the estate given by the residuary devise is converted into an estate for the life of the devisee by the latter clause? I am of opinion that it is not. There is no doubt but that when a testator has signed his will, effect must be given to the whole, unless it is impossible to reconcile all the clauses. It is only in such a case that the last clause can prevail to the exclusion of the rest. But how are the two parts of this will totally impossible to be reconciled to each other? There is first a general devise of the residue; and secondly, the particular devise of *Redvales*. It seems to me that they are perfectly reconcileable, and that the testator meant more expressly to declare by the latter words that his widow should enjoy the property. Had they stood alone, they would have conferred a limited estate, but they must be read with the former expressions, which are perfectly reconcileable. Had the second devise been, “I give *Redvales* to my

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wife for her life only," it would have been inconsistent with the former, and must have prevailed on that account, but there is no inconsistency here, so that they may stand together and have the effect of giving a fee to the widow.

BOLLAND B.—I am of the same opinion. The residuary clause would have passed the testator's whole interest in *Redvales* to his widow, and the question is, whether the subsequent words are so inconsistent with it as to alter its effect. After the clause at the beginning of the will had been struck out, by which this property had been devised away, the residuary clause came into operation respecting it, and the subsequent words were only added to make the widow's immediate possession of *Redvales* quite certain. In all the former devises to his wife he gave the property to her for life only, whereas here the same words are not used. The judgment of Lord *Ellenborough* in *Williams v. Thomas* (a) is in point.

GURNEY B.—I concur with the opinions delivered by my brothers. The wife took an estate in fee by the residuary clause, and there is nothing in that which was subsequently added to take it away. Judgment of *nolle prosequi* must be entered for the defendant.

(a) 12 East, 141.





STOBART and Others (Executors of WILLIAM STOBART) *against* DRYDEN.

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**T**HIS was an action of covenant on a mortgage deed for securing 800*l.*, with interest at 4*l.* per cent. The deed was set out on oyer. Pleas: first, *non est factum*; secondly, that the deed was executed by the defendant to secure the sum of 700*l.* only, and that such sum, after the execution of the deed by the defendant, was fraudulently altered by one *William M'Cree*, one of the attesting witnesses thereof, without the consent, privity, or knowledge of the defendant, to the sum of 800*l.*; which the replication denied. At the trial before Lord Abinger C. B. at the last summer assizes for the county of *Durham*, the mortgage deed was produced, purporting to be attested by *M'Cree* and *Potts*. *M'Cree* was dead, and *Potts* being called stated he had no recollection of having witnessed the deed, and he doubted whether his own signature and that of the defendant were genuine. Another person was then put into the box, who swore to *M'Cree's* handwriting; and other witnesses spoke to their belief of the genuineness as well of *Potts's* signature as of the defendant's. The deed was read, and contained a covenant by the defendant for the payment of 800*l.*, which sum had been written on an erasure. It appeared in evidence, that the sum of 700*l.* was first applied for, and afterwards 800*l.*, which last-mentioned sum was paid by the mortgagee's attorney to *M'Cree*, who acted as the attorney of the mortgagor, on receiving from *M'Cree* the deed executed by the latter. For the defendant witnesses were called, who denied that the signature of the defendant was genuine, and had either forged or fraudulently altered the deed, were not admissible in evidence on the part of the defendant.

Covenant on a mortgage deed. Pleas; *non est factum*, and that the deed after its execution had been fraudulently altered by *A.* one of the attesting witnesses, by increasing the amount of the mortgage money from 700*l.* to 800*l.* On the deed being produced, its execution by the defendant appeared to be attested by *A. & B.* *A.* being dead, *B.* was called, who stated he had no recollection of having witnessed the deed, and doubted whether his own signature and that of the defendant were genuine. The handwriting of *A.* and the defendant were thereupon proved by other witnesses:—Held, that declarations of *A.* tending to prove that he

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it was also proposed to put in evidence certain letters and declarations of *M'Cree* subsequent to the transaction, admitting that he had been guilty of improper conduct with respect to the deed and the defendant, although they did amount in terms to a confession that he had committed forgery. This evidence, which was intended to induce the jury to believe that *M'Cree* had either forged the defendant's signature, or had fraudulently altered the deed, was rejected by the lord chief baron, and the plaintiffs had a verdict.

*Cresswell* in *Michaelmas* term obtained a rule for a new trial, on the ground that the evidence ought to have been received, and cited *Wright v. Littler* (a), *Aveson v. Lord Kinnaird* (b), and 2 *Stark. Evid.* 263 (2nd edit.) The case was argued in *Hilary* and *Easter* terms, before Lord Abinger C. B., Parke B., Bolland B., and Gurney B.

*Alexander* and *W. H. Watson* showed cause. The declarations of *M'Cree*, whether they went to the extent of proving he had committed forgery or not, were inadmissible in evidence. The general rule as to hearsay evidence is thus laid down by Mr. *Phillips* (c): "Hearsay is not admitted in our courts of justice as a proof of the fact which is stated by a third person. This general rule (subject to certain exceptions hereafter to be mentioned) has been recognized and approved from the earliest times as a fundamental principle of the law of evidence, and is always to be strictly observed. Some of our earliest writers lay it down as a proposition acknowledged in our courts, and not to be questioned, that matters of fact shall be tried by proof of witnesses before the judges. This implies

(a) 3 Burr. 1244; 1 W. Black. 346.

(b) 6 East, 193.

(c) 1 Phill. Evid. 229.

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that the person on whose statement any fact is to be proved, must be sworn in the regular form, and speak to the fact from his own personal knowledge in open court at the time of trial." The rule is stated to the same effect by Mr. *Starkie* (a). The exceptions to the rule, as enumerated by Mr. *Phillips*, consist of seven classes: first, dying declarations; secondly, hearsay in questions of pedigree; thirdly, hearsay in questions of public right, customs, boundaries, &c; fourthly, old leases, rent-rolls, surveys, &c.; fifthly, declarations against interest; sixthly, rectors' and vicars' books; and lastly, tradesmens' books. [*Parke* B. The sixth class is a branch of the fourth.] It is submitted that the declaration tendered in the present case does not fall within any of the above classes. *Wright v. Littler* was cited on moving this rule, but that case, when carefully examined, is not an authority for their admissibility. There, after the handwriting of the two witnesses to the will, who were dead, had been proved in the usual manner, the plaintiff called the sister of one of them to show that the will was a forgery. She swore that, while she was attending her brother in his last illness, and about three weeks before his death, he pulled out of his bosom a will of earlier date, saying it was the true will, and gave it to her with directions to deliver it over to the lessor of the plaintiff. On her cross-examination she added, that her brother acknowledged to her that the second will was forged by himself. The jury having found that such will was a forgery, on a motion for a new trial, Lord *Mansfield*, with respect to the evidence of the forgery, says, "It came out upon their own examination, they made no objection to it at the trial, and it certainly was a circumstance proper to the jury to consider." And he puts its admissibility chiefly on the ground of its being a dying de-

(a) 1 Stark. Evid. 39, 42.

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claration, when the witness “ could be under no temptation to say it, but to do justice and to ease his conscience.” At that period dying declarations were held admissible in many cases ; as, for instance, the dying declarations of paupers as to their settlement, but they have since been restricted to the case where the death of the party making the declaration is the subject of investigation (a). Undoubtedly Lord *Ellenborough*, in *Aveson v. Kinnaird* (b), mentions a nisi prius case before Mr. Justice *Heath*, in which he, on the authority of *Wright v. Little*, was permitted to give in evidence that the attesting witness to a bond in his dying moments begged pardon of heaven for having been concerned in forging it, and states that the ground on which Mr. Justice *Heath* admitted the evidence was, that if the subscribing witness could have been called at the trial to prove his handwriting to the bond, he might have been cross-examined as to the forgery. And Mr. Justice *Bayley*, in *Doe v. Ridgway* (c), assigns the same reason ; adding, that “ the party ought not by the death of the witness to be deprived of obtaining the advantage of such evidence.” Such a principle, however, is clearly not deducible from *Wright v. Little*. Mr. *Starkie* adopts the dictum of *Bayley J.*, and says in a note (d), that upon the same principle evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose handwriting is proved in order to substantiate some instrument. But no case is to be met with in the books where such evidence has been received ; although, when the character of the attesting witnesses is impeached on the ground of fraud in the transaction in question, evidence has been admitted of their general good character. *Doe v.*

(a) *Rex v. Mead*, 2 B. & C. 605.

(b) 6 East, 195.

(c) 4 B. &amp; Ald. 53.

(d) 2 Stark. Ev. 264.

*Stephenson (a), Doe v. Walker (b), Bishop of Durham v. Beaumont (c), Provis v. Reed (d).* When once the character of the attesting witnesses is gone into, of course you may give evidence impeaching it in contradiction; but that is very different from doing so in the first instance. Then with respect to the other instances in which hearsay is admissible, there is no pretence for saying that these declarations stand on the same footing with entries against interest, entries in old books, or in the course of business, or in the discharge of some duty, which being free from suspicion bear the appearance of authenticity so as to dispense with the sanctity of an oath, and the cross-examination of the witness. There must be some equivalent for those safeguards to make the evidence admissible. [*Parke B.* Another exception should be added to the list of the cases in which hearsay is admissible, that of a declaration accompanying an act.] Here the declarations are not contemporaneous with the execution of the deed, which took place two years before. Suppose in the present case the witness *Potts* had died previous to the trial, persons might have been called to prove he had said he never signed the deed; whereas, in his examination, he did not distinctly deny his handwriting, and it was manifest that his signature was genuine. Again, if *M'Cree* had been alive, he could not have been called upon to answer questions tending to show that he had forged the instrument; and if not, these declarations are not admissible on any principle whatever. [*Parke B.* You make use of *M'Cree* as a witness, for his handwriting being on the deed is a presumption in its favour. May you not show his acts at another time to rebut that presumption? Then if you can show his acts, can you give evidence of declarations

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(a) 3 Esp. 285.

(b) 4 Esp. 50.

(c) 1 Camp. 207.

(d) 5 Bingh. 435; 3 M. &amp; P. 4. S.C.

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by him inconsistent with such presumption? It is a point for consideration where the line should be drawn.] Evidence of acts done by a deceased attesting witness would be capable of explanation, but declarations would not; whether the latter are tendered to show a forgery, or the circumstances under which the deed was prepared, they are equally dangerous. Such evidence is easily manufactured, and cannot be met or guarded against, and its admission will be fraught with the worst consequences to the rights of property.

*Cresswell*, Sir *Gregory Lewin*, and *Addison*, contra. The other side, in enumerating the exceptions to the general rule of evidence, have omitted that which allows proof to be given of the handwriting of a deceased attesting witness. The attestation is no more than a declaration by the witness that he saw the party execute the deed, and where the witness is dead his signature must be proved. In the present case, the plaintiffs made use of *M' Cree's* declaration in their own favour, which entitled the defendant to give evidence of other declarations by him, not that the deed was forged, but tending to show that he did not see the deed executed by the party. The cases that have been cited cannot be supported on any other principle than that assigned by Lord *Ellenborough* and Mr. Justice *Bayley*. Those cases are said to proceed on the ground of the declarations being made *in extremis*, and therefore under circumstances equivalent to the sanctity of an oath; but that reason does not meet the objection that the other party is deprived of the advantage of cross-examination. Dying declarations are not admissible to prove any thing but the cause of death, which shows that they are admitted, more from the necessity of the case, than from the approach of death being considered as equivalent to an oath. If the plaintiffs are allowed to introduce

*M'Cree's* declaration in support of the deed, the defendant may impugn it by declarations which he has made at other times. [Lord *Abinger* C. B. Are you not assuming that the signature is a declaration? Is it not a fact? *Parke* B. Suppose there was a written declaration on a separate paper, that a party had signed a deed. Would that be evidence?] No. [*Parke* B. Then the evidence is confined to the fact of execution.] In *Wright v. Littler* the admissibility of the evidence was put in the argument, on the ground that it was given to discredit the evidence arising from the proof of the witness's handwriting, and that he must have been called if living, and would have overturned the will by giving evidence of what his sister swore he owned to her. So here, if *M'Cree* had been alive and had been called, he might have been cross-examined as to the circumstances under which the mortgage deed was prepared, and as to the disposal of the money; and if he had sworn falsely, he might have been contradicted by producing his own letters. Is the defendant to be deprived of that advantage because the plaintiffs, instead of calling *M'Cree*, prove his handwriting? The *nisi prius* case cited by Lord *Ellenborough* in *Aveson v. Kinnaird*, is an authority for the defendant. The fact of the evidence being a dying declaration makes no difference, for that was not the ground on which it was admitted by Mr. Justice *Heath*, who recognised its admissibility as a substitution for the cross-examination of the party. In the *Bishop of Durham v. Beaumont* the attention of Lord *Ellenborough* was again drawn to the point; and he says, referring to *Doe d. Stephenson v. Walker*, "There the attesting witnesses, whose character was disputed, were dead, and it was properly held that the party claiming under the will, should have the same advantage as if they had been alive. In that case they must have

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been personally adduced as witnesses, when their character would have appeared on cross-examination; and being dead, justice required that an opportunity should be given to show what credit was to be attached to their attestations of the will. In like manner, the court of King's Bench held, in the time of Lord Mansfield, that evidence of the conduct of deceased witnesses might be received to attract credit to their testimony, or to destroy its effect." And referring to the case before Mr. Justice Heath, he says, "This confession only supplied the place of what might have been obtained from cross-examination, and the propriety of admitting was never questioned." Evidence of the handwriting of an attesting witness is allowed to be given, on account of the inconvenience that would be caused were it to be excluded. Can it be said that injustice will be done in allowing the other side to show that his attestation is unworthy of credit? The argument of the danger and hardship of admitting such evidence only amounts to this, that juries may occasionally attach too much weight to it. On the other hand, there may be both danger and hardship in not admitting it, for all the attesting witnesses to a deed may go abroad to avoid being examined, whereby the party wishing to impeach their credit will be deprived of all means of destroying the effect produced by the mere proof of their handwriting.

*Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE B.—This was an action on a covenant in a mortgage deed, to which there was a plea of *non est factum*, tried before Lord Abinger at the last summer assizes for the county of *Durham*.

A man named *M' Cree*, who, on the face of the instrument, appeared to be the subscribing witness, being



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dead, the execution of the deed was proved in the usual way, by evidence of his handwriting, and the identity of the defendant was shown by proof of his. Mr. *Cresswell*, for the defendant, offered in evidence declarations of *M'Cree*, of facts tending to prove that the deed was a forgery. Lord *Abinger* rejected them, and on a motion in the following term, a rule *nisi* for a new trial was granted, which has since been argued, and the court have taken time to consider the question, which, like all others relating to the rules of evidence, is important. We, who heard the argument, are all of opinion that the evidence was properly rejected.

The general rule is, that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence; but certain exceptions have also been recognized, some from very early times, upon the ground of necessity or convenience. The simple question for us to decide is, whether such a declaration as this be one of the allowed exceptions to the general rule.

As the plaintiffs, upon its appearing that the supposed subscribing witness was dead, were at liberty to give secondary evidence of the execution of the deed, and for that purpose proved the handwriting of that witness in the attestation (which raises a presumption of the due execution, otherwise the name could not have been placed there), there can be no doubt but that the defendant might also on his part give evidence to rebut that presumption by the proof of any material fact, tending to show that the deed was not so executed; such, for instance, as the absence of the alleged attesting witness from the place where the deed was stated to have been signed at the time. But the question is, whether he is to be permitted to rebut this presumption, not by evidence of facts proved in the ordinary way, but proved by *declarations* of the subscribing

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witness? Is evidence of what the subscribing witness *has said* admissible?

It was contended on the argument that it was, and that it formed an exception to the general rule, and on two grounds; one of them, which I shall mention first, in order to dispose of it, was, that as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this argument is, that evidence of the handwriting in the attestation is not used as a declaration by the witness, but to show the fact that he put his name in that place and manner in which, in the ordinary course of business, he would have done if he had actually seen the deed executed. A statement of the attesting witness by parol, or written, or any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is therefore not the proof of a declaration, but of a fact.

The other ground, and the principal one, on which the most reliance was placed, was, that it was in the nature of a substitute for the loss of the benefit of the cross-examination of the subscribing witness, if he had been alive and personally examined; by which either the fact confessed would have been proved; or, if not, the witness would have been liable to be contradicted by proof of his admission: and it was contended that every declaration was admissible which might have been given in evidence to impeach the credit of the witness himself on his personal examination.

Let us inquire what the authorities are in support of this exception. If we should find them numerous and of long standing, we should be bound to give effect to them, though we might doubt the policy of introducing such a departure from the established rule; if we find them few, and of comparatively recent origin, and not

supported by the deliberate judgment of any court, we ought not to sanction the introduction of such an exception, especially if its convenience and practical utility be of a doubtful nature.

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The first case referred to is that of *Wright v. Littler*, in which it appeared that a witness for the plaintiff, on his cross-examination *by the defendant's counsel*, stated, that the subscribing witness to an instrument, the validity of which, as a will, formed a part of the defendant's case, acknowledged in his last illness, on producing, as a true document, a prior will which he had in his custody, that the instrument in question was forged by himself. No objection was taken to the evidence at the trial. On a motion for a new trial, the whole case was fully discussed, and the application was refused on several grounds; amongst others, the admissibility of this evidence was considered, and Lord *Mansfield*, according to the report in *Burrow*, in answer to the objection that this evidence was improperly received, says "it came out upon their *own examination*, they made *no objection to it* at the trial, and it certainly was a circumstance proper for the jury to consider." And after alluding to the other facts, he says "that the account given in the last moments of the subscribing witness was proper, even though it had been upon an examination of the plaintiff; and as the account was a confession of a great enormity, and as he could be under no temptation to say it, but to do justice and ease his conscience, he was of opinion that it was proper to be left to the jury; but independently of that declaration, he thought fraud and forgery were apparent."

From this report, it is clear that Lord *Mansfield* by no means lays it down distinctly as an established rule of evidence, that such a declaration, even when made *in extremis*, is admissible. If it had been in his opinion

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a rule of law, that such statements were evidence, it is not likely that he would have assigned so many other reasons for refusing a new trial: and if we look at the report of the same case in Sir *William Blackstone's Reports*, that impression is confirmed; for his lordship is stated to have declared distinctly, that *no general rule could be drawn from it*, and that unless manifest injustice had been done in the whole case there was no ground for a new trial.

On the authority of this case, Mr. Justice *Heath*, at *nisi prius*, admitted evidence that the attesting witness in his dying moments begged pardon of Heaven for having been concerned in forging the bond or will; and Lord *Ellenborough*, who states that decision, and apparently with approbation, twice in 6 *East*, 195, and 1 *Camp.* 211, says that it was admitted, on the ground that as the subscribing witness might have been cross-examined as to the fact, his declaration of the fact might have been proved, in contradiction to the presumption of a due execution of the bond, from a proof of the handwriting of the subscribing witness; and he also adds, that the propriety of the reception of the evidence was not questioned.

This ruling of Mr. Justice *Heath* was also referred to by Mr. Justice *Bayley* in *Doe v. Rigway*, where he says, “that the case of the subscribing witness *seems to be* founded on the principle, that the defendant ought not to be deprived of the advantage of such evidence of contradiction by the death of the witness.” Such is the state of the authorities on this subject, which are very limited indeed in point of number; and when it is considered in how qualified a manner the opinion of Lord *Mansfield*, the origin and foundation of the others, is expressed,—and when it is recollected that both then and at the time of the *nisi prius* trial before Mr. Justice *Heath*, an opinion prevailed (which is now

properly exploded), that *any* declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath, which consideration certainly had an influence on the mind of Lord *Mansfield* at least,—it is impossible to say that there is any such weight of authority, however great our respect for the eminent judges whose names have been mentioned, so as to induce us to hold that this case is established and recognized as an exception from the great principle of our law of evidence, that facts, the truth of which depends on parol evidence, are to be proved by testimony on oath.

If we had to determine the question of the propriety of admitting the proposed evidence on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that it was at the least very doubtful whether, generally speaking, it would not cause greater mischief than advantage in the investigation of truth. An extreme case might occur, as there seems to have done before Mr. Justice *Heath*, where the exclusion of evidence of a death-bed declaration would probably have been the exclusion of one mode of discovering the truth. The same may, perhaps, be said of all solemn assertions *in extremis* by deceased witnesses. But, on the other hand, if any declarations at any time from the mouth of subscribing witnesses, who are dead, are to be admitted in evidence, (and you cannot stop short of that, for no one contends that the exception is to be confined to death-bed declarations, and if so confined, the evidence would be inadmissible in the present case) the result would be, that the security of solemn instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods by loose declarations of attesting witnesses, which those parties would have no opportunity of con-

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tradicting or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination. We cannot help feeling, therefore, that it is at least very doubtful whether the establishment of such an exception would be productive of any advantage; and when the great benefit to the administration of justice, of abiding by general rules and acting upon general principles, is taken in consideration, we feel no doubt but that it would be inexpedient to sanction this additional exception to the established rule of evidence. We therefore think that the rule for a new trial must be discharged.

Rule discharged.

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SHEPHERD and Another *against* O'BRIEN.

An affidavit of debt stating the defendant to be indebted to the plaintiffs in 40*l.*, for the hire of a berth on board a ship of the plaintiffs, let by them to the defendant at his request, is sufficient.

**J.** *JERVIS* had obtained a rule to show cause why the *capias* should not be set aside, and the bail-bond given in this case should not be cancelled, on the ground that the affidavit of debt was insufficient. The affidavit was in the following terms:—" *N. T. S.*, of &c., shipbroker and agent for *James Shepherd* and *E. L. Dickson* of &c., owners of the ship called the *City of Edinburgh*, of the port of *London*, maketh oath and saith, that *Edward O'Brien* is justly and truly indebted unto the said *J. S.* and *E. L. D.* in the sum of 40*l.* for the hire of a certain berth on board the said ship, let by the said *J. S.* and *E. L. D.* to the said *E. O'Brien* and at his request." A previous application had been

made to *Parke B.* at chambers, who on the authority of *Brown v. Garnier* (a) declined to make any order.

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Alexander showed cause. *Brown v. Garnier* goes the full length of the present case. There, an affidavit which stated the defendant to be indebted to the plaintiff "for the hire of divers carriages of the deponent, hired to and for the use of the defendant," was held sufficient, the court of Common Pleas being of opinion that the words used were equivalent to saying "let to hire to the defendant."

Jervis contra. This case is distinguishable from *Brown v. Garnier*. There the objection was to the word "hire," instead of "let to hire," but the terms employed imported that the carriages had been used by the defendant; whereas, for all that appears here, the party may not have used or enjoyed the berth. An affidavit of debt for goods sold, without stating that they were delivered, is insufficient. Here the affidavit discloses a contract for a berth, which is tantamount to a sale of goods, but then it should have shown an enjoyment of the berth, to make it equivalent to a delivery of the goods. [*Parke B.* It is not necessary that the berth should be occupied. Supposing a berth is hired, the money to be paid down, and the ship sails without the passenger, he may still be arrested. If there is an agreement to pay a sum certain, a man may be held to bail upon it. The only question is, whether that should not be stated. This affidavit would clearly have been sufficient if it had stated that the party was indebted in 40*l.* to be paid down.] Here the vessel might put into a port during her voyage and obtain a passenger for the berth. [*Parke B.* That would only go in reduction of the damages.]

(a) 6 Taunt. 389.

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PARKE B.—When this matter was before me chambers, I certainly felt some doubt until I referred the case of *Brown v. Garnier*. It then seemed to me that I was justified in holding this affidavit to be sufficient, and I am still of that opinion. Although the objection was not taken in *Brown v. Garnier*, that was rather a stronger case than the present, for the words “let, &c.” are inserted here. It appears to me that the party making this affidavit might be indicted for perjury, if it were shown that the money was not to be paid down, and that the ship had not completed her voyage. With respect to the cases where the word “indebted” has been held to be insufficient, it will be found that they are cases where there may be a debt due *in præsentì solvendum in futuro*, and therefore it is necessary to show that the time of payment has arrived.

BOLLAND B.—It seems to me, on the authority of *Brown v. Garnier*, that this affidavit is sufficient. If it had not been for that case I should have required the party coming before me, to state that the berth was to be paid for before the sailing of the vessel.

ALDERSON B.—It appears to me, that the word “indebted” must have full effect given to it, except in the cases mentioned by my brother *Parke*.

GURNEY B. concurred.

Rule discharged.

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LLOYD *against* JONES.

J. JERVIS had obtained a rule *nisi* to set aside the writ of summons in this case, and all the subsequent proceedings, on the ground of irregularity in the indorsement on the copy served, which was as follows:—"This writ was issued by *Wm. Loaden, 32, Great James-street, Bedford-row, agent for the plaintiff in person, who resides at Barmouth.*" The objection was, that the above indorsement was not a sufficient compliance with the requisites of the 2 Will. 4. c. 39. s. 12., which requires that the writ shall be indorsed with the name and place of abode of the attorney suing out the same, or in case no attorney shall be employed, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

A copy of a writ of summons was indorsed "This writ was issued by *W. L., 32, Great James-street, Bedford-row,*" agent for the plaintiff in person, who resides at *Barmouth*:—Held, insufficient.

Sir *G. Lewin* showed cause, and contended that the indorsement was sufficient. Mr. *Loaden* is an attorney of the court, and has actually sued out the writ and indorsed his own name and place of abode upon it, which is all that the statute requires. He has also *ex abundanti cautela* put the residence of the plaintiff for whom he acts—the indorsement is according to the facts.

LORD ABINGER C. B.—The attorney states himself that he does not act as attorney, but as agent.

ALDERSON B.—The statute, in speaking of a party employing an attorney, means an attorney employed in the ordinary way, and not as agent, which is the case here.

Rule absolute.

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BIANCHI *against* NASH.

The plaintiff agreed to "lend or let" the defendant a musical snuff-box, on the understanding, that if it were damaged the defendant was to pay for it, and 3*l.* 10*s.* was fixed upon as its value. The box having been damaged while in the defendant's possession, the plaintiff refused to take it back, and brought an action for goods sold and delivered, to recover the 3*l.* 10*s.*:—Held, that the action might be maintained.

DEBT for goods sold and delivered. Plea, *non assumpsit*. At the trial before the under-sheriff of *Middlesex*, it appeared that the defendant had applied to the plaintiff, who was a dealer in musical snuff-boxes, to "lend or let" him a musical snuff-box, which the plaintiff agreed to do, on an understanding that if the snuff-box were damaged, the defendant should pay for it; and the sum of 3*l.* 10*s.* was fixed upon as its value. The snuff-box having been damaged while in the defendant's possession, the plaintiff refused to take it back, and brought the present action for the price of it. The under-sheriff, in summing up, left it to the jury to say whether the agreement between the parties was a sale, or a loan, that in the event of the snuff-box being damaged the transaction was to be a sale. The jury found in favour of the plaintiff, and returned a verdict for the plaintiff for damages 3*l.* 10*s.*

F. V. Lee having obtained a rule for a new trial, on the ground that the agreement was merely a bailment, which should have been declared on specially, and that there was no evidence to support the count for goods sold and delivered,

Chandless showed cause, and contended, that upon the evidence the plaintiff was entitled to recover under the count for goods sold and delivered. The only question between the parties was with respect to the nature of the agreement, which the jury decided by finding it to be a conditional sale. The condition having happened, the sale became absolute, and might, according to the authorities, be declared on as such.

F. V. Lee contra. There was no evidence given

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this case of a contract for goods sold. It was a mere bailment of the article, with an agreement to pay a stipulated sum for damage. It has been decided that a party cannot recover under the common count for goods sold where there is a special contract. In *Lyons v. Barnes* (a) where a party sold beer in casks, giving the defendant notice that unless he returned the casks in a fortnight he would be considered the purchaser of them, and the defendant did not return them within the fortnight, it was held by Lord *Ellenborough*, that the plaintiff could not maintain an action for them as for goods sold and delivered. [*Parke* B. In that case there does not appear to have been any agreement on the part of the defendant; there was no evidence of any contract. Lord *Abinger* C. B. The facts do not seem to me to warrant the judgment. Are there not many cases in which, when goods are sold on condition, and the condition is performed, you may declare in the general form for goods sold? *Parke* B. *Bailey v. Goldsmith* (b) is an authority that where goods are sold on sale or return, and they are not returned in a reasonable time, the value may be recovered under a count for goods sold and delivered.] It is submitted that here there was no sale at all.

LORD ABINGER C. B.—I think the jury were warranted in finding that this was a conditional sale, and that the damage having happened, the defendant should pay for the article. He agreed to pay 3*l.* 10*s.* as the price of the box in case it sustained damage.

PARKE B.—There was clearly evidence to go to the jury that this was a contract for a conditional sale, and the condition having happened, the amount may be recovered under the count for goods sold and deli-

(a) 2 Stark. N. P. 39.

(b) Peake's N. P. C. 56.

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vered. *Bailey v. Goldsmith*, which is an authority on the latter point, is consistent with principle.

BOLLAND and GURNEY Bs. concurred.

Rule discharged.

HEATH *against* FREELAND.

The value of materials cannot be recovered under a count for work and labour.

Debt in 10*l.* for work and labour, and on an account stated. Plea, as to all the sum demanded except 7*l.*, *nunquam indebitatus*; as to the 7*l.* the defendant suffered judgment by default. At the trial the plaintiff proved materials provided to the amount of 8*l.* 4*s.*, and work done to the amount of 4*l.* 4*s.* 10*d.*, but gave no evidence applicable to the account stated: Held, that the defendant was entitled to a nonsuit.

DEBT for 10*l.* for work and labour, and on an account stated. Plea, as to all the sum demanded, excepting 7*l.*, parcel, &c., *nunquam indebitatus*. As to the 7*l.* the plaintiff had judgment by default. At the trial before the under-sheriff of *Sussex*, the plaintiff proved work done as a carpenter, and materials found for the defendant to the amount of 12*l.* 8*s.* 10*d.*, but no evidence was given applicable to the account stated. For the defendant it was objected, on the authority of *Cotterell v. Apsey* (a), that the plaintiff could not recover for materials on a count for work and labour. The under-sheriff gave the defendant leave to move to enter a nonsuit, and directed the jury to find their verdict for the plaintiff for 12*l.* 8*s.* 10*d.*, distinguishing how much was due for materials and how much for work. The jury found 8*l.* 4*s.* to be due for materials, and 4*l.* 4*s.* 10*d.* for work.

Gale having obtained a rule to enter a nonsuit, pursuant to the leave reserved,

G. T. White showed cause. The point taken by the defendant at the trial does not arise on this record, for it admits that 7*l.* is due to the plaintiff. The 7*l.* is

(a) 6 Taunt. 322.

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stated in the plea to be parcel of the debt generally, and the plaintiff is at liberty to take that sum and to apply it to the account stated, and to give evidence at the trial in support of the count for work and labour. There are many authorities to show, that where money is paid to a party he has a right, unless it is specially appropriated, to apply it to what account he thinks fit. It was therefore unnecessary for the plaintiff to give any evidence beyond the sum he sought to recover for work and labour. Admitting that, according to *Cotterell v. Apsey* a verdict cannot be entered for the plaintiff for the materials ; at any rate he has a right to have a verdict for the 4*l.* 4*s.* 10*d.* which the jury found to be due to him for work and labour. [*Parke B.* The meaning of the plea is, that the defendant never was indebted to the plaintiff for work and labour and on an account stated, in more than 7*l.*; you, on the part of the plaintiff, must show that he was. Now there was no evidence at all given on an account stated, and therefore you must confine yourself to the count for work and labour. If you had shown more than 7*l.* to be due on the account stated, then you would have been entitled to your verdict on the count for work and labour. It is very clear that the plaintiff cannot recover except for work and labour, and on an account stated; but all you have proved is 4*l.* 4*s.* 10*d.* on the former, which is more than covered by the 7*l.* Lord Abinger C. B. The plaintiff undertook to prove at the trial, that the defendant owed him more than 7*l.* either on the one count or the other.] It is submitted, however, that this case is distinguishable from *Cotterell v. Apsey*. There was there a written contract, and the ground of the decision was, that the contract was one entire contract to do several things, which the plaintiff had professed to state in his declaration. But there was no contract here, it was a common carpenter's job,

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and it is unreasonable to divide the materials from the work and labour. The latter will draw the farm after it as necessary to the employment.

LORD ABINGER C.B.—The court will not be persuaded of that. The rule must be absolute for nonsuit.

PARKE B.—I think you may have judgment of nonsuit after judgment by default.

Rule absolute.

Gale was to have supported the rule.

BALLINGER *against* FERRIS.

Where a constable apprehends a party under the *bonâ fide* belief that he has committed an offence against the 7 & 8 G. 4. c. 30., (the Malicious Trespass Act,) such constable is entitled to notice of action, under the 41st section, although he did not see the alleged trespass committed, and there is no proof of the owner of the property injured having made any complaint to him.

TRESPASS for assaulting and imprisoning the plaintiff until he delivered up a certain horse, on order to procure his discharge (a). Plea, not guilty. The facts proved at the last *Monmouthshire* assizes were these:—the plaintiff, in driving a waggon into the dock-yard at *Chepstow*, overturned and injured an and cart, which stood in the street close to the waggon. He was detained by some bystanders for ten minutes when the defendant, a police-constable appointed under a local act, came up and took him to a lock-up house where he was kept about one hour, till he gave up one of his horses as a security for the payment of the damage. At a hearing subsequently before a magistrate he was ordered to pay, and paid 2*l.* for the damage, and the horse was then given back to him. For the defendant it was urged, that he was entitled

(a) A second count stated the plaintiff to have been imprisoned till he paid 3*s.*

to a month's notice of action under the 7 & 8 Geo. 4. c. 30. s. 41., the act against malicious trespasses, on the ground that the action was brought against him for "a thing done in pursuance of the act;" and *Beechey v. Sides* (a) was cited. *Williams J.* held, that as the defendant did not see the injury committed, and it did not appear that the owner of the property complained to him, the defendant was not entitled to notice of action, but gave leave to move to enter a nonsuit. The case being left to the jury as one in which the defendant was not justified in imprisoning the plaintiff, they gave a verdict for one farthing.

In *Easter* term *Ludlow Serjt.* obtained a rule nisi for a nonsuit, pursuant to the leave reserved, against which

Greaves now showed cause. It is submitted that the learned judge was right in holding that the defendant was not entitled to notice of action. By the 7 & 8 Geo. 4. c. 30. s. 28., a party can be apprehended without a warrant only where he is *found committing* some offence against the act, and then it must be for the purpose of being taken before some neighbouring justice, to be dealt with according to law. In *Rex v. Curran* (b), where the question arose on the Larceny Act, 7 & 8 Geo. 4. c. 29. s. 63., in which the same words are employed as here, it was held, that if the party making the arrest did not see the offender in the actual commission of the offence, or was taking him elsewhere than before a magistrate, his killing such party would not amount to murder. That authority bears directly on the present case, and shows that the apprehension of the plaintiff was illegal, for he was not found committing the act, neither did it appear that any information had been given to the defendant by the party

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(a) 9 B. & Cr. 806; 4 M. & R. 634.

(b) 3 C. & P. 397.

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aggrieved. The subsequent detention was also illegal, for the plaintiff was taken to a lock-up house instead of being carried before a justice. But there was no malicious or wilful act on the part of the defendant to justify an arrest at all. [*Alderson B. Beechey v. Sides* shows that the question does not depend upon whether the act is malicious or not; Lord *Tenterden* there says "It has been uniformly held, that where a party *bonâ fide* believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause."] That case is distinguishable from the present; there the defendant was owner of the premises, and gave an express charge to the constable. The true ground of distinction is not whether the party is acting *bonâ fide*, but whether he has done some act which is within the scope of his authority, so as to entitle him to notice. The object of the statute is to protect officers where they have merely exceeded their authority in some respects, but not where they have no authority at all. If a constable may apprehend a party an hour after the act complained of, he may arrest him twelve hours afterwards; some part of what he does must be within the scope of his authority. [*Alderson B. In Beechey v. Sides* no part of the act done was within the authority; there the party apprehended was asserting a right.] *Cooke v. Lennard* (a) shows that some portion of the act must be within the authority. *Bayley J.* there says "If an officer does any act, part of which is, and part of which is not authorized by the statute, or if a magistrate act in a case which his general character authorizes him to do, the mere excess of authority, in either case, does not deprive the officer or magistrate of that protection which is conferred upon those who act in execution of it; but where

(a) 6 B. & C. 351.

there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection." The rule laid down in that case is applicable here. [*Alderson* B. Surely a constable must be entitled to notice when he is in the wrong, when he is in the right he does not need it.] He may be entitled when he is in some degree in the wrong, but not where he is altogether so.

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Ludlow Serjt. (*Whateley* with him) in support of the rule. It may be conceded that the defendant acted illegally, the question is, whether he did not *bonâ fide* believe that he was acting in the execution of his duty, and in pursuance of the statute; which according to Lord *Tenterden*, in *Beechey v. Sides*, is the proper test. But here the learned judge laid it down broadly to the jury, that the defendant acted illegally, and left to them only the question of damages. With respect to the injury committed to the plaintiff, it is clear that it was wilful and malicious within the meaning of the statute. [He was then stopped by the court.]

Lord ABINGER C. B.—The court are all of opinion that the question is not whether the officer acted illegally, but whether he acted in pursuance of a supposed authority conferred by the statute. To enter into nice distinctions as to what acts are within the scope of their authority; would be invidious and disastrous to public officers. Here the officer must have been close by when the act was done, and some representation must have been made to him; for he takes the plaintiff into custody and detains him some time; until he delivers one of his horses as a security for the damage, when he is liberated. The act might have been done negligently, but the bystanders seem to

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have thought it malicious, for they immediately hold of him. It seems to me, that the defendant, though he may have mistaken the statute, meant to be under it, and the jury appear to have been of opinion that he acted *bonâ fide*, by the very moderate damages they have given. We should take away the protection conferred by the statute if we were to hold, in a case where there may be a doubt as to the authority of the party, but none as to his motives, that he should have the opportunity afforded by a notice of action of tendering amends. The act, in giving him an opportunity to tender amends, supposes him to be unable to make out a justification. I think that this rule may be made absolute.

BOLLAND B. concurred.

ALDERSON B.—It is also clear that under s. 41 of this act, the plaintiff would not be entitled to costs for there is no certificate of the judge's approbation of the action.

GURNEY B. concurred.

Rule absolute

BROOK *against* LLOYD.

Although by the rule of *H. T. 2 W. 4. s. 108.*, the plaintiff may, where he takes issue on the defendant's pleading, add the *similiter* without ruling the defendant to rejoin, if he does not do so the defendant may add the *similiter* to entitle himself afterwards to move for judgment as in case of a nonsuit.

ARCHBOLD had obtained a rule *nisi* for judgment as in case of a nonsuit.

Sewell showed cause, and objected that the cause was not at issue, inasmuch as though the three special pleas pleaded by the defendant had been traversed

by the plaintiff, no *similiter* had been added. He cited *Gilmore v. Melton* (a).

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Archbold contra. By the rule of *H. T. 2 Will. 4. s. 108.*, “in all special pleadings where the plaintiff takes issue on the defendant’s pleading, or traverses the same, or demurs so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin.” The question is, whether since that rule the sending in of a *similiter* is not dispensed with, and it is to be added by the plaintiff in making up the issue; whereupon issue is joined as fully as it was before. [*Alderson* B. If the defendant wishes to take advantage of it he must add the *similiter* himself.]

LORD ABINGER C. B.—The meaning of the rule is only this, that the plaintiff may add the *similiter* if he thinks proper, without calling on the defendant to rejoin. You move on the ground that issue has been joined two terms ago, but it turns out that issue never has been joined; you should have added the *similiter*.

Rule discharged, with costs.

(a) 2 Dowl. P. C. 633.

BOUNSALL *against* HARRISON.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, dated 17th *July* 1830, A second indorsee brought an action against the acceptor of a bill of exchange, to which the latter pleaded, that it was indorsed to the plaintiff after it became due. At the trial it was proved on the part of the defendant, that the bill was drawn and accepted for the accommodation of *R.*, the first indorsee, in *July* 1830. At the time the bill became due *R.* and the defendant were on friendly terms, but they afterwards quarrelled. No notice of its dishonour was given to the drawer. The action was not brought until the present year (1836). *R.* was not called by either party at the trial. Held, that there was evidence to go to the jury, that the bill was indorsed to the plaintiff after it became due.

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drawn by one *Needham*, payable two months after date to his own order, and indorsed by him to one *Robertson*, and by the latter to the plaintiff. The defendant pleaded, first, that his acceptance and the indorsement by *Needham* and *Robertson* were without consideration; secondly, that the bill was indorsed to and received by the plaintiff after it became due. Replication to the first plea, that the indorsement by *Robertson* to the plaintiff was for value and consideration. The plaintiff replied to the second plea by traversing its allegation. At the trial before *Gurney B.* at the *Middlesex* sittings during the present term, the learned judge ruled, in accordance with the decision in *Mills v. Barber (a)*, that the defendant was bound to begin. It was proved for the defendant, that in *May 1836* *Robertson* wrote, requesting the defendant to lend him his acceptance, and a bill for 20*l.*, payable two months after date, was accordingly drawn on the defendant by *Needham*, and indorsed by him for *Robertson's* accommodation, which bill became due on the 17th *July*. On that day *Robertson* requested the defendant by letter to renew it; who thereupon accepted the bill whereon the present action was brought. No notice of the dishonour of the bill had been given to *Needham*. Some time subsequently proceedings had been instituted in Chancery respecting the guardianship of a child of the defendant, which occasioned quarrel between *Robertson* and the defendant, who had previously been on friendly terms. It was stated by the defendant's attorney, that after the present suit was commenced he called on the plaintiff and told him that if he would sue *Robertson* on the bill the defendant would indemnify him against the costs. The plaintiff ultimately declined, saying, that having given value for the bill he must proceed with the action; adding, that *Robertson* owed him much more money. *Robertson*

(a) *Ante*, 835.

was not called by either the defendant or the plaintiff; the latter offering no evidence. The learned judge, in his summing up, remarked on the circumstance of *Robertson* not being called by the plaintiff; and said, that the bill not being sooner put in suit was a fact which led to the inference, that it remained after it became due, and until his quarrel with the defendant, in *Robertson's* hands, for whose accommodation it had been drawn, and whose duty it was to take it up. The learned baron concluded by leaving it to the jury to say whether the bill came into the plaintiff's possession after it was due. The jury having found in the affirmative, a verdict was entered for the defendant on the second plea.

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John Jervis now moved for a new trial, on the ground of misdirection. The case stands precisely on the evidence as it stood on the record, upon which, according to the previous decision of this court, the plaintiff is entitled to a verdict. No inference could be fairly drawn against the plaintiff on account of the staleness of the bill; and that circumstance, which appeared on the record, did not render it incumbent on him to go into further evidence. The letters which were read did not vary the relative situation of the parties, they only proved that the acceptance and first indorsement were without consideration, which was admitted by the replication. The conversation between the plaintiff's and the defendant's attorney went to prove that the bill had been indorsed to the plaintiff for value; so that, if any thing, the case is more favourable to the plaintiff upon the evidence than upon the record. At any rate there was nothing in the evidence which warranted the jury in inferring that the bill was indorsed to the plaintiff after it became due; and it was not his duty to call *Robertson*, neither was it a question for the

LORD ABINGER C. B.—The learnt
I think there was sufficient evidence
unless the plaintiff called *Robertson*
only was an accommodation bill, but
the plaintiff after it became due.
five years the presumption is, that
accommodation it was made took it
according to his contract. At the end
a stranger brings an action on the bill
to me that the circumstance of *Robertson*
to the plaintiff affords a reason why
pressure, transfer the bill to the latter.
A sufficient *prima facie* case was made
of the defendant, that the bill was
after it became due. Then why should
to call *Robertson*? The party who
ness has not been guilty of fraud on,

PARKE B.—I concur that there
evidence to go to the jury upon the second
of the defendant: with respect to the
conversation with the defendant's attorney
the bill was indorsed for value, and
verdict should have been for the plaintiff.
the second plea the presumption is,

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place, no action is brought on the bill for upwards of five years. I am not prepared to say that this circumstance alone would cast suspicion on the bill, so as to raise an inference it had not been transferred until after it became due; but besides this there are these other facts. The bill was drawn and indorsed by *Needham* for *Robertson's* accommodation; he should therefore have taken it up when due. If it had then been in the hands of the plaintiff, the presumption is, that he would have given notice of its dishonour to *Needham*. This he did not do, and a presumption therefore arises that the bill was indorsed to him when over-due, which is strengthened by the fact, that at the time the bill became due the defendant and *Robertson* were on friendly terms, and that they afterwards quarrelled. All these circumstances lead to the inference that the bill was indorsed to the plaintiff after it became due. With respect to calling *Robertson*, when it is considered that the defendant, if he called him, must have done so to prove that he (*Robertson*) had been guilty of fraud, it is no wonder that the defendant did not do so. There appears to have been no misdirection on the part of the judge, he left the case to the jury, and it certainly was a case for them.


BOLLAND and GURNEY Bs. concurred.

Rule refused.

BROOMFIELD *against* SMITH.

DEBT for goods sold and delivered. Plea, that the defendant never was indebted in manner and that the goods were sold on a credit not expired at the time of action brought, is open to the defendant on the general issue, *nunquam indebitatus*.

In debt for goods sold and delivered, the defence,

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form as alleged in the declaration. The cause was tried in the sheriff's court of *London* under a writ of trial, when the sale and delivery of the goods were proved. For the defendant it was opened, that the goods were sold on a credit which had not expired at the time of action brought. On the part of the plaintiff *Edmunds v. Harris* (a) was cited to show that such a defence must be specially pleaded. It was urged for the defendant, that the contract was not to pay on request, but on credit; which latter condition being a part of the contract, was put in issue on the plea of *nunquam indebitatus*. Mr. Serjeant *Arabin* ruled for the plaintiff, rejecting the evidence, and the plaintiff had a verdict.

A rule for a new trial was afterwards obtained by *Barstow*, on the authority of *Taylor v. Hilary* (b), *Cousens v. Paddon* (c), and *Alexander v. Gardner* (d).

Ryland showed cause, and relied on *Edmunds v. Harris*. [*Alderson* B. How does the evidence offered in this case confess and avoid the debt, so as to render a special plea necessary?] It admits a *debitum in presenti solvendum in futuro*. [*Alderson* B. How is the defendant indebted until the credit is expired? The test of special pleading is, that you must confess the debt and avoid it.] The new rules of pleading *Hil. 4 Will. 4*. tit. Pleadings in particular Actions, c. 1. s. 1. and c. II. s. 3. show that any matter which avoids the action must be specially pleaded. [*Alderson* B. But in order to avoid, you must first confess the debt. There are several authorities in this court in point (e).]

(a) 2 Adol. & E. 414; 4 Nev. & M. 182.

(b) 5 Tyr. 373.

(c) 5 Tyr. 535.

(d) 1 Scott, 281; 2 Bing. N. C. 67, S. C.; and 5 Tyr. 542. See also *Jones v. Nanney*, ante, 638.

(e) See *Cousens v. Paddon*, supra; *Gregory v. Hartnoll*, ante, 303.

LORD ABINGER C. B.—This court has already decided, in *Cousens v. Paddon*, that where a special contract for goods to be furnished, or work to be done at a fixed price, has not been performed, and the plaintiff sues on the implied assumpsit to pay on request, the defendant may prove, under the general issue *non assumpsit*, that the goods delivered were not of the quality contracted for, or that the work was done in an improper manner.

Rule absolute.


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BROOMFIELD
v.
SMITH.

DAVENPORT *against* DAVIES.

ASSUMPSIT for money had and received. Plea, *non assumpsit*. At the trial before Lord Denman C. J., at the last *Liverpool* assizes, it appeared that a sum of 13*l.* had been deposited with the defendant as a stakeholder, being the amount of two wagers made by the plaintiff with one *Roberts*, namely, a wager of 10*l.* to 1*l.*, and another of 1*l.* even, “that the plaintiff was worth 3000*l.*, and he would prove it the next morning.” The plaintiff, by this action, sought to recover the 13*l.*, or at all events, 11*l.*, the stake which he had deposited, and which it was alleged he had re-demanded before it was paid over to *Roberts* by the defendant. The particular of demand was in the following terms: “This action is brought to recover the sum of 13*l.* viz. 11*l.* deposited by the plaintiff, and 2*l.* deposited by one *Roberts* in the hands of the defendant as a stakeholder, and won of the said *Roberts* by the plaintiff on or about the 15th of *November* last.” The plaintiff did not succeed in proving he had won the wagers, but proved a demand of his stake of 11*l.* For the defendant it was objected that the plaintiff could not, under

A particular of demand stated the action to be for the amount of stakes deposited by the plaintiff and one R. with the defendant, and won of R. by the plaintiff.—*Held*, that the plaintiff could not, under such particular, recover the amount of his own stake, on proof he had re-demanded it from the defendant before it was paid over.

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the above particular, recover the sum deposited by him. The Lord Chief Justice was of that opinion, but left the case to the jury, who found for the plaintiff, damages 11*l.*, leave being reserved to the defendant to move to enter a nonsuit. In *Easter* term *W. H. Watson* having obtained a rule accordingly,

Wightman now showed cause. The defendant could not have been misled by the variance between the particular and the real claim, for he must have known whether the sum was demanded or not, and the ground on which such demand was made. [Lord *Abinger* C.B. In your particular you claim the sum as a wager won, and he comes prepared to show that it was not. If you had stated that you demanded your stake back, as having rescinded the wager, then he might have produced evidence that it never was rescinded. *Gurney* B. How could any one suppose by this particular that you meant to claim the sum as an undecided wager?] It points out the sum that the plaintiff seeks to recover, and it is the same money, whether demanded in one right or another; and the plaintiff could not have established either case without calling the witnesses who were present at the transaction. It has never been held, that because you demand a larger sum, you shall not recover a smaller. [*Alderson* B. No one disputes that you might have recovered 11*l.*, although you demanded 13*l.*, if you had not claimed it as a wager won.] A plaintiff is not bound to strict accuracy in his particular, so long as it does not mislead the defendant; *Harrison v. Wood* (a), *Lambirth v. Roff* (b).

LORD ABINGER C.B.—But this particular does mislead. I think that the impression of the Lord Chief

(a) 8 Bing. 371; 1 M. & Sc. 586. (b) 8 Bing. 411; 1 M. & Sc. 597.

Justice at the trial was right, and that he should have nonsuited. The particular renders the count for money had and received, a count for money received under special circumstances, which the plaintiff was bound to make out, whereas he proves a totally different case. Although the witnesses might have been the same in both cases, yet it is possible that the defendant, if he had been aware that the plaintiff intended to show he demanded back his money before the wager was decided, might have brought evidence to prove that he did not. I think that the rule should be absolute for a nonsuit.

1836.

DAVENPORT
v.
DAVIES.

ALDERSON and GURNEY Bs. concurred.

Rule absolute.

TURNER *against* SWAINSTON, Clerk.

TRESPASS *quare clausum fregit*, to which the defendant pleaded a justification under a public right of way. At the trial a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, to an arbitrator, with power to direct what should be done between the parties. The arbitrator, by his award, directed the verdict taken for the plaintiff to be set aside, and a verdict entered for the defendant; and he also directed that the plaintiff should put up a new stile, and place a bridge of plank at a certain spot on the footpath in question.

An action of trespass *quare clausum fregit*, to which the defendant pleaded a justification under a public right of way, was referred, with power for the arbitrator to direct what should be done between the parties. He directed a verdict to be entered for the defendant, and that the plaintiff should put

R. V. Richards had obtained a rule to set aside so up a stile, and place a bridge at a certain spot on the footpath in question. The place where the stile and bridge were to be erected was not on land either of the plaintiff or the defendant, but of third parties.—*Held*, that so much of the award as directed those acts to be done, was void.

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v.
SWAINSTON.


much of the award as related to the putting up of the stile and bridge, upon an affidavit by the plaintiff, that he had no right to enter upon the ground on which they were ordered to be placed. The arbitrator could not order the plaintiff to do that which would subject him to be treated as a trespasser.

Talfourd Serjt. showed cause, upon an affidavit which stated, there was no doubt that the owners of the land would permit the plaintiff to enter upon it for the purposes mentioned in the award; that the footpath, which led to the parish church, was an accommodation to the whole parish, and that one great object in agreeing to the reference was, that the road might be rendered accessible by the means directed to be adopted in the award. The plaintiff's affidavit does not state that he ever attempted to comply with the award, or had made any application to the parties to whom the land belongs. [*Parke* B. We hesitated to grant the rule, thinking it would turn out that the land was the defendant's, but it appears that it is not his.]

Richards in support of the rule. The arbitrator could not direct the plaintiff to do acts which would render him liable to an action of trespass by the owners of the land. [*Parke* B. Are the terms of the award conditional—that he is to do the acts, provided such owners shall consent?] No; and even if they were, the award would be bad: an arbitrator has no authority to order a party to do that which he cannot justify in law.

PARKE B.—I think it would have been sufficient if the award had said that the plaintiff was to do the acts, provided the owners and occupiers of the land should consent. The question is, whether the award

is void as to that part, or the objection only arises by way of answer to an attachment to enforce it. We are, however, disposed to think that so much of the award as directs any thing to be done in the lands of third persons is void. It is not within the terms of the submission which extend only to what is to be done between the parties, and no action could be maintained for not performing it. This rule must, therefore, be absolute, to set aside the award to that extent.

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 v.
 SWAINSTON.

BOLLAND, ALDERSON, and GURNEY Bs. concurred.

Rule absolute accordingly.

OSBORNE *against* WILLIAMSON.

HUMFREY had obtained a rule for the discharge of the defendant, who was in custody on a judgment signed upon a cognovit, on the ground that he had become a bankrupt, and had got his certificate.


Where a motion is made to discharge a defendant out of custody, on the ground that he has become bankrupt, and has obtained his certificate, the affidavit on which the rule is moved should show that the certificate has been inrolled pursuant to the 6 Geo. 4. c. 16. s. 96., and the rule should be drawn up on reading the inrolment.

Petersdorff, on showing cause, took a preliminary objection that the affidavit did not state that the certificate had been inrolled, pursuant to the 6 Geo. 4. c. 16. s. 96., which must be done before the bankrupt can be discharged, *Jacobs v. Phillips* (a).

Humfrey. It is not necessary that the inrolment should appear on the affidavit; it is sufficient if it

(a) 4 Tyr. 652.

A defendant, who had obtained his certificate after the action was brought, was held entitled to be discharged out of custody, although the fiat issued ten months before the commencement of the action, and he had pleaded, not setting up his bankruptcy, and had afterwards given a cognovit to pay the debt and costs at a time subsequent to the period when the plaintiff could have obtained judgment in the regular course of proceeding.

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v.
WILLIAMSON.

is shown to the court. He then produced the inrolment.

LORD ABINGER C. B.—I do not think that the mere production of an inrolment in another court, without being verified by some affidavit, is sufficient.

The rule was about to be enlarged for the affidavit to be amended in this respect, when the objection was waived : and

Petersdorff showed cause on the merits. The bankrupt ought not to be discharged in this case. The fiat issued in *January* 1835, the capias issued on the 23d of *November* 1835, and the certificate was allowed on the 6th *May* 1836. The defendant pleaded to the action, not setting up his bankruptcy, and afterwards gave a cognovit to pay the debt and costs three months after the time at which the plaintiff could have obtained judgment in the regular course of proceeding. Therefore a new security was entered into, giving the defendant further time, which suspended the legal right of the plaintiff, and was not discharged by the certificate.

LORD ABINGER C. B.—Do you call a cognovit a new security? The cognovit does not create a new debt, and the party is entitled under the statute to be discharged, if he is in custody, for a cause of action which existed previous to the bankruptcy, and to which the certificate would have been a bar, if it had been obtained in time. Suppose he had allowed judgment to go by default, would that be a new debt? A cognovit amounts to the same thing. The rule must be absolute; but you had better procure an affidavit verifying the inrolment, otherwise the loose expression of the Lord Chief Baron, in *Jacobs v. Phillips*, that the bank-

rupt is to be discharged on producing his certificate, may grow into a precedent. It ought to have been before us when the rule was granted.

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ALDERSON B.—The proper course is for the rule to be drawn up on reading the inrolment.

Rule absolute accordingly, without costs.

LEVI *against* CLAGGETT.

JOHAN JERVIS had obtained a rule to reverse the outlawry issued against the defendant in this cause, without payment of costs, on two grounds:—first, that the capias had been issued with directions to the sheriff to return it *non est inventus*; secondly, that at the time the exigent was awarded, the defendant was beyond seas. The defendant alleged in his affidavit, that he went abroad on the 29th of *April*, that it was not to avoid the process in this cause, and that he returned to *England* before the proclamations: that he was now in custody in this action, and had a detainer lodged against him in another.

Where a defendant was abroad when the exigent in outlawry was awarded, the outlawry was reversed on payment of costs and putting in bail in the alternative in the original action.

Humfrey showed cause, on an affidavit of the plaintiff's attorney, stating that the writ issued on the 28th of *April*, and was placed in the hands of the sheriff on the following day; that the defendant went abroad on the latter day, according to the deponent's belief, in order to avoid his creditors, who had issued writs against him to the amount of 28,000*l.*, which he had no means of satisfying.

At first the court made the rule absolute generally, but afterwards called on *Jervis* to state if he had any

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CLAGGETT.

authority for moving to reverse the outlawry, on either of the grounds alleged, without payment of costs.

Jervis. It is admitted that the plaintiff sent the writ to the sheriff, with directions to return it *non inventus*, which is an abuse of the process that makes the proceedings irregular, and if so, the outlawry ought to be reversed, without payment of costs. *Pigou v. Drummond* (a) is in point. [*Alderson B.* There is also the question whether you should not give bail. Have you looked at *Graham v. Henry*? (b) In that case it does not appear that the defendant had gone abroad to avoid being served, and the court reversed the outlawry on payment of costs, and on putting in bail to pay the condemnation money or render.] The question is, whether this court will adopt the practice of the King's Bench, or the Common Pleas. Previous to the Uniformity of Process Act this court generally followed that of the Common Pleas. By the 10th section of that act, writs are to be in force for four calendar months, and are not to be returned sooner, unless by the order of a judge. Here the *capias* was returned in fifteen days. [*Gurney B.* The defendant did not suffer by that, for he was abroad.] It may be said, that the writ is to be kept alive for four months to benefit the plaintiff, but it is also a privilege of the defendant, and to obtain a return sooner the fact must be stated to a judge, and must be such as would entitle the plaintiff to a *distringas*. *Lewis v. Davidson* (c) may be cited by the other side, but there the irregularity was not distinctly shown on affidavit, and the proceedings were assumed to be regular; and it may be inferred from what the court said, that if

(a) 1 Bing. N. C. 354; 1 Scott, 264.

(b) 1 B. & Ald. 131.

(c) 5 Tyr. 198.

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proceedings had been similar to those in the present case they would have been set aside.

As to the second point, the authorities are undoubtedly against the defendant with respect to the costs; and in the King's Bench, and probably in the Common Pleas, the reversal would only be made on payment of costs and putting in bail in the alternative. [*Alderson* B. That only places the defendant in the same situation as if he had given bail at first. How can you claim to be in a better situation?] On the first point the defendant has a right to insist on the irregularity. [Lord *Abinger* C. B. He went abroad the very day the writ was put into the hands of the sheriff, therefore he was *non inventus*. What prejudice has he suffered?]

Humfrey. A judge's order was obtained for the return of the *capias* in fifteen days.

LORD ABINGER C. B.—Then that ground fails the defendant. With respect to the other point we think it better to follow the practice of the Court of Common Pleas in this particular case, and leave it for further consideration what practice should be adopted hereafter. The rule must, therefore, be absolute on payment of costs, and putting in bail in the alternative in the original suit.

ALDERSON B.—I think the practice of the Court of Common Pleas the better, but I may have a prejudice in its favour.

GURNEY B. concurred.

Rule accordingly.

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JENKS and Another *against* TAYLOR.

Where a defendant seeks to enter a suggestion to deprive a plaintiff of costs, on the ground that the action ought to have been brought in a court of requests, he cannot have the costs of an issue, which has been found in his favour, taxed for him in the superior court.

The *Birmingham* Court of Requests Act, (47 G. 3. c. 14. s. 12.), requires that parties having debts not exceeding 5*l.* owing to them from persons inhabiting within the town of *Birmingham*, "or using or frequenting the markets there, or working or seeking a livelihood, or in any way trading or dealing within the same," should sue in the court of requests. Held, that such using or frequenting the markets, or trading, or dealing, must be with a view of thereby substantially obtaining the whole livelihood of the party.

ASSUMPSIT for sand sold and delivered. Plea as to 1*l.* 15*s.* payment into court; as to 12*s.* set-off. The replication to the first plea alleged damages *ultra*; and to the other, denied the set-off. The case was tried before the under-sheriff of *Worcestershire* and the plaintiff had a verdict for 17*s.* on the first plea.

Humfrey had obtained a rule to enter a suggestion on the roll to deprive the plaintiff of his costs, on the ground that the action should have been brought in the *Birmingham* Court of Requests, under 47 Geo. c. 14. s. 12., which enacts, that any person having a debt or balance of account or otherwise, not exceeding the value of 5*l.* owing to him, "by or from any person whomsoever inhabiting, residing, or being within the town of *Birmingham* and hamlet of *Deritend*, or keeping or using any house, coach-house, wharf, quays, lodging, shop, shed, stall, or stand; or using or frequenting the markets there; or working or seeking a livelihood, or in any way trading or dealing within the same," may sue for it in the court of requests. S. 12. deprives of their costs plaintiffs who sue in any other court. The defendant in his affidavit deposed, that he sought his whole livelihood by manufacturing bricks at *Balsall Heath*, about a quarter of a mile from the hamlet of *Deritend*, and selling the same in *Birmingham*; and that at the time the writ issued, and some time before, he kept and used part of a house in *Cheapside*, in *Birmingham*, in the occupation of another, for which he paid compensation, attending there daily for the purpose of receiving orders, keeping his books, and transacting his business of a brick

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maker; that he regularly used and attended and frequented the *Birmingham* markets to sell his bricks and buy his materials for his business, and had for some years attended in *Birmingham* daily on week days to buy and sell in his trade.

Another point was made, that the defendant was entitled to have his costs taxed to him on the issue of set-off, found in his favour; but *per Curiam* (*Bolland, Alderson, and Gurney* Bs.) the cause must either remain in this court or be taken out of it, with all the legal consequences of either step. If the defendant avails himself of its being brought in this court, when it should have been commenced elsewhere, and deprives the plaintiff of his costs on that ground, he, the defendant, cannot claim to receive any thing from the plaintiff, which he would be entitled to if the cause remained in this court.

A rule having been granted on the other point,

Erle now showed cause, on affidavits that the defendant was a builder, who made bricks at *Balsall Heath*, out of the jurisdiction of the court, and sold them there to any person who applied; that he had built houses at that place, in doing which he used the sand the subject of this action. That he used the *Birmingham* markets no more than any other person living near, and had often been absent from *Birmingham* for days together, and that the house in *Cheapside* was a shoemaker's shop kept by a relation, without any appearance of any place of business there, or any name or sign of the defendant. He contended, that as the defendant did not obtain substantially his whole livelihood within the inferior jurisdiction, and did not regularly frequent the markets for the purpose of substantially obtaining his living by trading or dealing therein, he was not entitled to the benefit of the act: for that the words "trading and dealing within the

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same," must be taken in conjunction with those speaking of a trading and dealing for the purposes of obtaining the party's livelihood, so as to constitute the town the proper place to seek him; otherwise every person travelling through and purchasing any article might be brought within the section. He cited *Stephens v. Derry* (a), *Reeves v. Stroud* (b), and *Double v. Gibbs* (c).

Humfrey contra, submitted that the affidavits filed on the part of the plaintiff furnished no answer to the positive affidavit of the defendant, and that the words "using or frequenting the markets there," show that it is not necessary that he should get his whole livelihood within the jurisdiction.

ALDERSON B.—Do you go the length of saying, that every tradesman who sends his servant to *Birmingham* with goods, which is trading and dealing there, is within the act? The words "using or frequenting the markets there" must be taken in connection with the rest of the clause, and, must be considered as meaning a frequenting of the markets by the party, so as thereby substantially to gain his whole livelihood.

Per Curiam.—(BOLLAND, ALDERSON, and GURNEY Bs.)

Rule discharged.

(a) 16 East, 147.

(c) Ibid. 583.

(b) 1 Dowl. P. C. 399.

TURNER *against* BERNARD.

A defendant is not deprived of the benefit of a Court of Requests trial before the sheriff.

ASSUMPSIT for work and labour, and on an account stated. Plea to the first count, payment of Act by payment of money into court, or by consenting to a trial before the sheriff.

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sl. 10s. into court, to which the plaintiff replied, damages *ultra*. At the trial before the under-sheriff of the county of *Warwick*, the plaintiff had a verdict for ~~sl.~~ 10s.

Erle on a former day in this term obtained a rule nisi to enter a suggestion, under the act mentioned in the preceding case, (47 *Geo.* 3. c. 14. s. 17.) on an affidavit that the defendant resided in the town of *Birmingham*.

Kelly now showed cause, and took two objections. First, the act does not apply to cases where money has been paid into court. If the plaintiff had accepted the sum paid into court in satisfaction, and had discontinued the action, he would clearly have been entitled to his costs under the rule of *H. T.* 4 *Will.* 4. r. 19., which are part of the costs of which the defendant now seeks to deprive him. He ought not, therefore, to be in a worse situation by proceeding to trial and treating the defendant's plea as a false plea, which it proved to be. It is submitted that this Court of Request Act cannot prevail where, under a rule of court which has the force of a statute, the plaintiff is entitled to his costs. [Lord *Abinger* C. B. The rule supposes a case where costs are due.] Where money is paid into court, which the plaintiff takes out, it has been held that the defendant has no right to his costs, under the 43 *Geo.* 3. c. 46. s. 3., *Rowe v. Rhodes* (a). [Lord *Abinger* C. B. How is the payment of a sum of money into court inconsistent with the provisions of a Court of Requests Act, which says, if a plaintiff does not recover a certain sum, he shall not have his costs?] Secondly, the cause was tried before the under-sheriff by the consent of both parties, and the defendant having agreed to that mode of trial cannot now say,

(a) 4 *Tyr.* 216.

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that the case should have been tried before another tribunal.

LORD ABINGER C. B.—I am of opinion that neither ground of objection is sufficient to deprive the defendant of the benefit of this act (*a*). The rules of court and the statute under which they are framed do not affect the Court of Requests' Acts.

ALDERSON B.—In this case an action has been brought for a sum of money not exceeding 5*l.*, which might have been recovered in the court of requests. The plaintiff never had a cause of action for more than 4*l.* 10*s.*.

GURNEY B. concurred.

Rule absolute.

(*a*) The latter objection had previously been overruled in this court. See *Bond v. Bailey*, 5 Tyr. 796.



DOE *dem.* HUMPHREYS *against* OWEN (*a*).

In discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking, the court will order payment of the costs of the day, "if any," although it is not shown by the defendant's affidavit that any costs have been incurred.

RULE for judgment as in case of a nonsuit. The defendant accepted a peremptory undertaking, but wished to have an order for the costs of the day, "if any," included in the rule.

Welsby for the plaintiff objected, on the ground that it did not appear by the defendant's affidavit that any costs had been incurred, and cited *Ray v. Sharp* (*b*).

(*a*) Decided in *Easter* term.

(*b*) 4 Dowl. P. C. 354.

But it is otherwise where it appears on the defendant's affidavit that no costs could have been incurred, as where a countermand of notice of trial was given in due time.

PARKE B.—You cannot be prejudiced by a provision for payment of the costs, “if any;” for if none have been incurred you will have none to pay.

Rule accordingly.

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In *Thomas v. Hutchinson*, in the present term, the same point arose, and *Shark v. Ray* was again cited for the plaintiff; but the court ruled in accordance with the above decision.

However, in another case during the same term, *Tarbuck, administrator, v. Bisphan*, where the defendant's affidavit disclosed that the notice of trial given for the assizes was countermanded in due time, the court, in discharging the rule for judgment as in case of a nonsuit on a peremptory undertaking, refused to make an order for payment of the costs of the day, if any; Parke B. observing, that it appeared from the defendant's own affidavit, that no costs could have been incurred.

KIRTON *against* BRAITHWAITE.

DEBT for goods sold and delivered, for work and labour, and on an account stated. Pleas, first, *nunquam indebitatus*; secondly, as to 3*l.* 6*s.* 9*d.* parcel &c., a tender; whereon issue was taken. The cause was tried before the under-sheriff of *Middlesex*, when it appeared that the action was brought to recover the sum of 3*l.* 6*s.* 9*d.*, being the balance of an account for stationary supplied by the plaintiff to the defend-

The plaintiff's attorney wrote to the defendant, saying, unless the plaintiff's debt, together with his (the attorney's) charge for the letter, were paid at his office on the

following *Wednesday* at twelve o'clock, proceedings must be immediately commenced. About ten o'clock on the *Wednesday* a clerk of the defendant went to the attorney's office, where he saw a clerk (a boy) to whom he tendered the amount of the debt. The boy having referred to the letter book, refused to receive the debt unless the charge for the letter were also paid. At eleven o'clock the attorney issued the writ. Held (*Parke B. dubitante*) that the tender was good, the attorney having no right to charge for the letter.

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ant. The following evidence was given to prove the tender. On the 8th of *February* 1836, the plaintiff's attorney, Mr *Elkins*, wrote to the defendant as follows :—

“ Sir,

“ I am instructed by my client, Mr. *James Kirton*, of *Portland Street, Cavendish Square*, to apply to you for payment of the sum of 3*l.* 6*s.* 9*d.* due from you to him; and I have to inform you, that unless the same, together with my charge as under, is paid at my office by *Wednesday* next, at twelve o'clock, proceedings will be commenced against you for the recovery thereof without further delay.

Debt £3 6 9

“ I am, &c.

Charge 0 6 8

“ W. M. ELKINS.

£3 13 5

“ Mr. *Frederick Braithwaite*.”

The clerk of the defendant swore that he went, by the defendant's directions, on the *Wednesday* morning before ten o'clock to Mr. *Elkins*' office, where he saw a servant, who informed him, on inquiring for Mr. *Elkins*, that neither he nor his clerk had arrived. He waited until a few minutes after ten, when a boy, one of the clerks, came in. The witness told him he had come to tender the amount of Mr. *Kirton*'s demand against Mr. *Braithwaite*, and placed 3*l.* 6*s.* 9*d.* on the table, which he said was the amount he was to tender. The boy refused to take the money, unless the charge for the letter was also paid, and said the whole amounted to 3*l.* 13*s.* 5*d.* The witness again tendered the 3*l.* 6*s.* 9*d.*, which being again refused, he went away. The boy, on the other hand, stated, that having referred to the letter book he refused to take less than 3*l.* 13*s.* 5*d.*, and that the defendant's clerk said he would pay the debt, but would not pay for the letter; that he put his hand into his waistcoat pocket, but did not take it out again, or tender any money. The boy further stated, that he told the defendant's clerk to call

again at twelve, which he did not do. Mr. *Elkins* came in soon after, when the boy told him he had desired the defendant's clerk to call again. The boy said he had no authority to receive the debt. The writ was issued on the same day at eleven o'clock. The under-sheriff told the jury, that if they believed the money was produced, there was, in his opinion, a good tender. The jury having found for the defendant,

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Knowles obtained a rule for a new trial, on the ground of misdirection, contending that the tender to plaintiff's clerk was not a good tender, *Bingham v. Allport (a)*.

Humfrey showed cause. The tender was sufficient. [*Parke B.* The ground on which the rule was granted was, that the boy swore he had no authority to receive the money.] The attorney having directed the defendant to pay the money at his office, constituted the persons who were in attendance there his agents to receive it. *Barrett v. Deere (b)* is a much stronger case than the present.

Knowles contra. The question is, whether the party to whom the tender was made had authority to receive the specific sum tendered; for if he had not, *Goodland v. Blewith (c)* shows that the tender was insufficient. The authority to pay the money at the office was given by the letter, which stated 3*l.* 13*s.* 5*d.* to be the amount which alone would be received, and that was to be paid at twelve o'clock; whereas the defendant's clerk went at an earlier hour, and tendered a smaller sum. If this tender is good, a tender to a laundress would have been sufficient. [*Parke B. No.* According to the letter it must be to some clerk at the office.] *Barrett*

(a) 1 Nev. & M. 398.

(b) 1 Nev. & M. 200.

(c) 1 Campb. 477.

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v. *Deere* was a case of payment, not of tender, and of the latter stricter proof of authority is required than the former. At all events the question, whether the party was authorized to receive the money, was for the jury, and should have been left to them, which it was not.

LORD ABINGER C. B.—If it had not been for the letter there would certainly have been no authority to make the tender to the clerk of the plaintiff's attorney; but when that attorney expressly required the money to be paid at his office, together with his charge for the application (which he had no right to exact), he authorized the payment of what was justly due to any clerk of his who might happen to be there. It seems to me that the tender was good.

PARKE B.—I feel some doubt in this case. There is no doubt, that to make a tender good it must be made to some person authorized to receive the money. It may be assumed here, that the boy had no authority to receive the money, independent of the letter. The question, therefore, resolves itself into a consideration of the letter. Now the effect of it was to authorize the payment of the money to any person at the office filling the situation of a clerk. My doubt is, whether it gave authority to such a person to receive less than the 3*l*. 13*s*. 5*d*. It is true that the attorney had no right to exact any charge for the letter, but he still might give a special authority to receive that sum alone. I have, therefore, some doubt as to the case; but as the rest of the court are of opinion that the tender was sufficient, the rule must be discharged.

BOLLAND B.—I am of opinion that the tender was good. By the letter which authorizes any p

son at the office to receive the money, a demand is made of more than is justly due, and the only doubt is, whether, as more is demanded than is tendered, the tender is sufficient. It appears to me that it was, there being no ground for the charge made by the attorney.

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GURNEY B.—This tender would not have been sufficient except for the letter; but after having written that letter the attorney was bound to attend the office himself, or to have a clerk there to receive the money for him.

Rule discharged.

ARCHBOLD *against* SMITH.

SPECIAL assignment of errors *coram vobis*, signed by counsel, to which the defendant had delivered the common joinder in error "*in nullo est erratum*," without counsel's signature. The plaintiff in error treated the plea as a nullity, and signed judgment, having previously given notice to the defendant that he should do so, unless the plea was signed by counsel.

The common joinder in error to a special assignment of errors need not be signed by counsel. (See *Reg. Gen. Hil. 4 W. 4. s. 4.*)

It is no ground of error *coram vobis* that the writs of *venire facias juratores* and *distringas* are returned with only one panel annexed to both, for the court will intend that it has been successively annexed by the sheriff to one and the other writ.

Halcomb having, in *Easter* term, obtained a rule to set the judgment aside for irregularity, with costs,

The *Attorney General* showed cause. Where the assignment of errors is special, and signed by counsel, the joinder in error should also be signed by counsel. This case is not within *Reg. Gen. Hil. term, 4 Will. 4. sec. 4.* which applies only to joinders in demurrer, which previous to that rule must likewise have had counsel's signature. The defendant is supposed to consult his counsel on the point, whether the facts

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amount to error or not, and the counsel, by his signature, according to the ancient practice, pledged himself that the facts, if true, did not amount to error. The distinction is between a special and a common assignment of errors; the latter not being signed by counsel, the common joinder to it does not require counsel's signature (*a*). [*Parke* B. The common joinder in error operates as a demurrer and admits the truth of the facts, putting it to the court if they amount to error. Where a party denies the facts, he should plead accordingly. Mr. *Tidd* seems to think that the signature of counsel is only necessary where the plea is special. In p. 1175, he says "the plea, or joinder in error, if common, need not be signed by counsel." That is only where the assignment of errors is also common; but here the assignment is special. In *Tidd's Forms* the common joinder in error is given as signed by counsel, which is an indication of his opinion, that it must be so signed.

Halcomb in support of the rule was stopped by the court.

PARKE B.—This is a pure point of practice, and in order that ours may be uniform with that of the other courts, the best way will be for us to inquire what has been the practice of the courts of King's Bench and Common Pleas.

PARKE B. shortly afterwards stated that the Master of the King's Bench and the Prothonotaries of the Common Pleas had certified, that it is not necessary, according to the practice of those courts, that the common joinder in error should be signed by counsel.

(*a*) Archbold's K. B. Practice, 257; Tidd's Practice, 1169.

Per Curiam.—The judgment has been irregularly signed, and the rule to set aside the judgment must be made absolute with costs.

Rule absolute accordingly.

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The judgment having been set aside, the case came on for argument in the present term.

The assignment of errors was as follows:—(a) “That although a writ of *venire facias juratores* was sued out in this action by and on behalf of the said *W. W. Smith*, to wit, on &c., and the same was then delivered to the sheriff of *Middlesex* to be executed; and although a writ of *distringas juratores* was sued out in this action by and on behalf of the said *W. W. Smith*, to wit, on &c., and the same was then delivered to the said sheriff of *Middlesex* to be executed; and although the said sheriff, in and upon the said writ of *venire facias juratores*, then made a certain indorsement in the words following; viz. ‘the execution of this writ appears by the panel annexed,’ and also the said sheriff, upon the said writ of *distringas juratores*, then made a certain other indorsement in the words following; viz. ‘the execution of this writ appears by the panel annexed,’ yet in fact there is but one panel, and there never has been more than one panel, and not two panels, one annexed to each of the said writs, as by law there ought to be; and therefore in this there is manifest error.”

Sir *W. W. Follett* for the plaintiff in error. Is there a return to the writ of *distringas* if no panel is annexed to it? *Rogers v. Smith* (b) shows that if there be no return or panel it is error, the panel being there held to be always necessary. Stat. 3 Geo. 2. c. 25. s. 8. proves that the *distringas* must have a panel annexed

(a) See Rolle’s Abr. tit. Error (I) pl. 7.

(b) 1 Ad. & Ell. 772; 3 Nev. & Man. 760, S. C.

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to it; and that ancient practice is again affirmed in the same terms by 6 Geo. 4. c. 15. s. 15. [Lord Abinger C. B. In *Rogers v. Smith* there was no return to the *distringas*, or panel annexed to it at all.] There must be two panels, for the returns to the two writs of *venire* and *distringas* are separately made on each, viz. that the return to this writ appears by the panel annexed. Then it is error if a panel is not annexed to each. By stat. 42 Ed. 3. c. 11. the *venire* must be returned before the trial at *nisi prius*; whereas the *distringas* being returnable on the first day in banc, cannot be taken to be returned till after the trial, its office being to show what jurors made default. Then the panel in this case must be taken to be annexed to the *venire*, and the sheriff has only returned that writ. The practice of returning the jury process is different in country and town causes. [Lord Abinger C. B. (after conferring with the Master)—The practice in town and country causes is the same. In country causes it is usual to return the *venire* at the assizes with the panel annexed, as in town causes. The *distringas* is returned to the assizes, and not to this court.]

Halcomb for the defendant in error. The record must be produced in court. That was done. The court then stopped him.

LORD ABINGER C. B.—In the case cited there was no return to the *distringas* or panel annexed to it; whereas here the *distringas* and *venire* have been returned with one panel annexed to both. The question is, whether the sheriff was bound to annex a distinct panel to each writ, or whether it was sufficient to annex the same panel to both. Both writs are in fact returned by the sheriff at the same time. As the panel annexed to each must be verbatim the same, no possible

mischief can arise from annexing the same to both writs, and we are of opinion that it is sufficient to do so.

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BOLLAND B. concurred.

ALDERSON B.—The argument for the plaintiff in error is *inter apices juris*. Why may not we hold that the sheriff has in fact annexed the same panel successively to each writ by putting in the same pin twice, as he had the opportunity to do? One panel answers two purposes.

GURNEY B. concurred.

Judgment for the defendant in error.

WILLIAMS *against* PIGGOTT.

MANSEL had obtained a rule to set aside the proceedings in this cause for irregularity, on the ground that the defendant had not been personally served with the writ of summons. From the affidavits it appeared that the writ was issued for a debt under 20*l.* on the 9th of *May*, between which day and the 16th the clerks to the plaintiff's attornies made repeated attempts to serve it at the defendant's house in *Lamb-lane, Hackney*, but could not gain admittance, the outer door leading into the fore court of the premises being constantly kept locked; and that on each occasion a servant informed them through a wicket gate, that the defendant was not at home. On the 16th an application was made to the defendant's attorney to give an undertaking to appear to the action, who stated that the defendant had directed him to appear for her, but

The service of process need not be personal to entitle a plaintiff to enter a common appearance for a defendant under the 12 *Geo. 1. c. 29. s. 1.* if circumstances be shown to the court from which it may be fairly inferred that the defendant got the writ.

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he wished, before he gave the undertaking, to be furnished with written instructions, which he expected to get in the course of the day. The undertaking not being given, a clerk of the plaintiff's attornies went to the defendant's house on the 21st of *May*, when a female servant opened the wicket gate, to whom he gave the copy of the writ in a sealed envelope, addressed to the defendant, requesting her to give it to her mistress, and telling her he would wait for an answer. The servant took the packet, and in a few minutes came back to the gate and peeped through the keyhole, and then returned into the house. The clerk, after waiting some time long, again rang the bell, when a man opened the wicket gate and said no one was at home; upon which the clerk requested the man to bring the note back, who replied, "Oh, no, I cannot do that." The affidavit went on to state the belief of the deponent (who had been informed that the defendant had been seen in her garden the same afternoon) that the defendant was then in the house, and had opened the envelope containing the copy of the writ. The plaintiff at the expiration of eight days entered an appearance for the defendant under the statute.

Erle now showed cause. There can be no doubt whatever upon these affidavits that the writ has come to the hands of the defendant, and there is no affidavit by her or by her servant that she did not receive it. In *Rhodes v. Innes* (a) a service by leaving a copy of the process inclosed in a letter with the defendant's son, at the defendant's residence, which is similar to the service here, was held sufficient; *Tindal* C. J. observing, that "there is no magic in the word 'personal' and a personal service of process may be waived in particular circumstances, or by the conduct of the

(a) 7 Bing. 329; 5 M. & P. 153; 1 Dowl. P. C. 215.

party." So here, where the defendant studiously keeps out of the way, and where no one can doubt the writ has reached her, the service is tantamount to personal service. At any rate there should have been an affidavit from the defendant, that the writ was never delivered to her. He also cited *Phillips v. Ensell* (a).

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Mansel contra. The proper rule for the guidance of the court is to be found in the words of the statute 12 Geo. 1. c. 29. s. 1. which enacts, that in cases where the defendant is not arrested, the plaintiff shall serve the defendant *personally* with a copy of the process; and if the defendant shall not appear at the return of the process, or within four days after, it shall be lawful for the plaintiff, on affidavit "of the personal service of such process," to enter a common appearance, or file common bail for the defendant. It is clear from the language of the act, that the service must be personal, and that the filing of an affidavit of personal service is required as a condition precedent before an appearance can be entered. The course which the plaintiff should have pursued was to apply for a *distringas* under the 3rd section of the Uniformity of Process Act, which provides that remedy for cases in which personal service cannot be effected. Great inconvenience will arise from allowing parties to make qualified affidavits of service, which will not only dispense with the requisitions of the 12 Geo. 1. but will lead to the evasion of the provisions of the Uniformity of Process Act with respect to a *distringas*. In *Redpath v. Williams* (b) sending process by the post in a letter which the defendant refused to receive, was held not to be good service, although the refusal might have been wilful, and was accompanied with a long avoidance of service.

(a) 2 Dowl. P. C. 684.

(b) 3 Bing. 443 ; 11 B. Moore, 333.

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In *Digby v. Thomson* (a), Taunton J. held that personal service could not be dispensed with, though the defendant had persevered in avoiding it. In *Thompson v. Phene* (b), Patteson J. said there ought to be an affidavit of personal service to entitle the plaintiff to file common bail, and stated that all the other judges were of the same opinion. The point is referred to the true principle by Alderson B. in *Phillips v. Evans*, who says "Here it must be presumed that the affidavit of service was in the usual form, and therefore the plaintiff is bound to produce the *pristine affidavit of service*; and the defendant must say that he did not get the writ." In that case the plaintiff *prima facie* brought himself within the provisions of the statute, but the present plaintiff's affidavit for this affidavit has altogether omitted to refer to the word "personal" with respect to the service.

LORD ABINGER C. B.—We should have been inclined to give this case further consideration, if it had not been for the decisions which have been referred to in the course of the argument. The question is whether it shall be deemed personal service, so as to satisfy the words of the statute. Suppose a defendant were to send a letter acknowledging the receipt of another writ, inclosing the writ, would that be sufficient? I do not think so. In that sense that would not be 'personal' service, and yet it might not be a service within the meaning of the statute. Here there is a circumstantial affidavit, from which it may be fairly inferred that the defendant got the writ. When therefore she comes to set the process aside as irregular, she ought at least to make an affidavit that she has never received it; but she does not deny it, she has not possession of the writ which she sets aside. All that the act meant was, that if a defendant would not appear, that a plaintiff might en-

(a) 1 Dowl. P. C. 363.

(b) *Ibid.* 441.

appearance for him, on making an affidavit of the personal service of the process, that is to say, informing the court of circumstances amounting or tantamount to a personal service. *Rhodes v. Innes* is to this effect, and on the authority of that case this rule must be discharged.

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BOLLAND and GURNEY Bs. concurred.

Rule discharged with costs.

MUSGROVE *against* NEWELL.

THIS was an action on the case for maliciously, and without reasonable or probable cause, having the plaintiff taken into custody, and charged before the mayor of *Leeds* with an assault upon the defendant, with intent to rob him. The defendant pleaded, first, not guilty; and, secondly, denied that the plaintiff had sustained any damage. At the trial before Lord *Denman* C. J. at the *Yorkshire* Spring assizes, the following facts appeared in evidence.

The defendant having reasonable and probable cause for thinking that the plaintiff was a party to an attempt to rob him, went for a constable, who, on seeing the plaintiff, told the defendant that the plaintiff was a respectable man, and that he (the constable) would be an-

The plaintiff, a respectable farmer, wishing to go to *York*, was waiting for the *York* mail, at the foot of *Kirkstall* bridge near *Leeds*, about eleven o'clock on

answerable for his appearance to answer the charge. The defendant, however, insisted on the constable taking the plaintiff into custody, and on the following day preferred a charge against him before a magistrate, which was dismissed.

In an action by the plaintiff against the defendant, for maliciously, and without probable cause, making such charge before the magistrate, the judge told the jury that the defendant had reasonable and probable cause for making the charge in the first instance, but that on the representation made by the constable, such reasonable and probable cause ceased, and that if the jury were of opinion that the defendant ought to have been, and was, in fact, satisfied of the plaintiff's innocence, but persisted in the charge from obstinacy or wounded pride, they ought to find their verdict for the plaintiff.

Held, that this was a misdirection; for, inasmuch as the facts remained unaltered, the reasonable and probable cause which they afforded was not taken away by the representation of character made by the constable.


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the night of the 11th of *August* 1835, his servant being with him, and his horse being fastened to turnpike-gate. A drunken man came up and leaned against the bridge, near to the place where they were standing. The defendant was riding across the bridge, and, as he approached the plaintiff, the drunken man rushed into the middle of the road, shouted, and made an attempt as if to seize the bridle of the horse. The defendant galloped forward, until he met a waggoner with whom he returned, and finding the three persons still on the bridge, he called upon the waggoner to assist him in apprehending them. After some words had passed, the defendant went for a constable, and before he came back with one, the drunken man had gone. The constable, on seeing the plaintiff, told the defendant that he knew him well, and that he was a very respectable man, and that he (the constable) would be answerable for his appearance to meet the charge. The defendant, however, after a search for the drunken man, insisted on the constable apprehending the plaintiff, offering to pay the latter 10*l.* in case he proved his innocence. The constable then took the plaintiff into custody, and he was, on the following morning, brought before the mayor of *Leeds*, who, after hearing the charge preferred by the defendant, dismissed it, and discharged the plaintiff.

The Lord Chief Justice told the jury he was of opinion that the defendant had reasonable and probable cause for making the complaint to the constable, but that on the representation made by the latter, such reasonable and probable cause was removed. If, therefore, the jury thought that the defendant ought to have been, and was, in fact, satisfied in his own mind of the plaintiff's innocence, but persisted in preferring the charge before the magistrate, from any improper motive,—as from obstinacy or wounded pride,—such con-

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duct amounted to malice, in the legal acceptation of the term, and their verdict ought to be for the plaintiff; but if they were of opinion that the defendant persisted *bonâ fide* in the charge, and that the reasonable and probable cause continued, notwithstanding the explanation of the constable, they ought to find for him. The jury returned a verdict for the plaintiff, damages 10*l*.

Cresswell having, in *Easter* term, obtained a rule for a new trial, on the ground of misdirection,

Blackburne and *Milner* now showed cause. The question is, not whether the jury came to a proper conclusion on the case, but whether the direction of the Chief Justice was right. It is submitted it was. The real complaint of the plaintiff against the defendant is the charge made before the magistrate. It may be admitted that if nothing had occurred between the alleged attempt on the defendant, and the preferring of such charge, that the defendant would have been justified in making it, but circumstances intervened which ought to have convinced the defendant that there was no foundation for his accusation against the plaintiff. The learned judge was, therefore, warranted in telling the jury that the question was, whether the defendant had reasonable and probable cause for making the charge on the following day. [*Alderson* B. Suppose the party accused calls witnesses to character before the magistrate, is the prosecutor liable to an action for preferring an indictment before the grand jury? Lord *Abinger* C. B. Where a man is apprehended under circumstances of suspicion, is the party, on proof of the man's good character, bound to be satisfied he had no intention to rob him? It must be assumed here that there was probable cause in the first

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instance. The question is, whether it continued at the time of preferring the charge?] That was a question for the jury. [*Alderson* B. The real question is, whether the circumstances connected with the charge such as might induce a reasonable presumption that there was an intention to rob the defendant?] Suppose, instead of a day, a year had passed before the charge was preferred, would it not have been a question whether the jury then had reasonable or probable cause for making the charge? If intervening circumstances are not to affect the probable cause, a party may persist in preferring a charge whether he believes it or not. Here the whole transaction and circumstances formed one and the same transaction, and cannot be separated. The chain of facts commenced with the drunken man seizing hold of the bridle of the defendant's horse, and ended with the defendant giving the plaintiff in charge. The representation of the constable must have satisfied the defendant of the plaintiff's innocence; at any rate it was a proper question to be left to the jury, whether he ought not to have been so satisfied. The case depending partly on matter of fact, and partly on matter of law, the learned judge was right in submitting all the circumstances to the jury, and leaving them to judge of the reasonable and probable cause; *Venafrá v. Johnson*(a), *M'Donogh v. Rooke*(b), *Nicholson v. Coghill*(c). [*Alderson* B. All the principles applicable to the present case are beautifully laid down in *Johnstone v. Sutton*(d).]

Cresswell and *Addison* in support of the rule. The error of the learned judge has arisen from not keeping the two questions of law distinct in his mind. First, all he said there was no malice, because there was no

(a) 10 Bing. 301; 3 M. & Sc. 847.

(b) 2 Bing. N. C. 217; 2 Scott, 359.

(c) 4 B. & C. 21.

(d) 1 T. R. 544.

able cause, and then said, that if the defendant afterwards persisted obstinately in making the charge, there was malice; thus treating the two as interchangeable terms (a). It is a mistake to suppose that the question of probable cause can, under any circumstances, be a question for the jury. [*Alderson* B. It is very often a legal question.] The jury are to find the real state of the facts, and the judge to decide upon them. *Lord Abinger* C. B. Suppose a party is attacked by a man whom he has reason to believe is his servant, but when going home he finds him laid up with a broken leg, and he persists in charging him with the offence,—although at first he has probable cause, he would not have it afterwards,—would not that be proof both of want of probable cause and of malice?] Where the facts remain the same, but the opinion of the party may be altered, it is a question of malice, not of probable cause. From a want of probable cause, malice may be inferred, but not the reverse. No one before making a charge is bound to take into consideration all the evidence which may be given when the charge is investigated. It would be dangerous to hold, that because a person might reasonably have come to the conclusion that the accused was innocent, he ought to have been satisfied he was. In *Blachford v. Dod* (b) it was held, the facts being undisputed, that it was not a question for the jury, whether the defendants believed they had reasonable cause for indicting the plaintiff. *Venafray Johnson* is distinguishable; the question there necessarily was, whether the words employed by the plaintiff amounted to a threat, and also whether the defendants so understood them. The rule laid down in *Johnson v. Sutton* has never been altered. Although the defendant might be satisfied in his own mind, yet if there

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(a) 1 Campb. 206, n.

(c) 2 B. & Ad. 179.

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were facts constituting a probable cause, he had a right to prefer the charge and have it properly investigated.

Lord ABINGER C. B.—I am of opinion that a new trial ought to be a new trial. This is certainly a case of some nicety, as are most of the cases in which questions of probable cause and of malice are mixed together: yet there is no doubt as to the principle governing such cases, which cannot be better laid down than in *Johnstone v. Sutton*. In order to support an action of this nature there must be both a want of reasonable and probable cause, and malice in the defendant. Where there is probable cause, even if there be excessive malice, the action cannot be maintained. Where there is a total absence of probable cause, the jury may infer malice; for in such a case, the party making the charge can only be actuated by a malicious motive. But you cannot infer from any degree of malice a want of probable cause; that stands upon a class of facts by themselves. Here the lord chief justice seems to have told the jury that the circumstances at first constituted a probable cause; but he appears to have gone a step further, and said, that afterwards the ground of suspicion was removed. Now, it is meant by that to say, that the account which the constable gave of the plaintiff removed the probable cause. I think he was wrong, for evidence as to the character of the party does not alter the facts, although it may weaken the inference to be drawn from them. However such a representation might affect the mind of a reasonable man, the facts themselves remained the same; and can it be said, because a party having a ground of suspicion is told by a constable that the person is of good character, the original probable cause is thereby taken away? It seems to me that it would be dangerous to allow such an attestation to affect

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prosecutor, who is not bound to believe it. If therefore the chief justice meant to say that the account of the constable did away with the probable cause, I think he was wrong. Judging from his notes, he appears also to have thought, that as the representation of the constable ought to have removed the probable cause, the question of malice was the only question for the jury. Supposing there was probable cause at first, but that afterwards the defendant ought to have been satisfied, the chief justice seems to have left it to the jury to say whether the defendant was so satisfied. I should say, his lordship was here also in error. For, admitting the probable cause, you cannot say that because the defendant should have believed the constable, but did not do so, that therefore he was actuated by malice. Here there is no pretence for inferring malice, except from that circumstance. It struck me at first, that if the subsequent facts were such as ought to have satisfied the defendant, that would take away the probable cause; but on consideration there is a clear distinction between facts which alter the original facts, and a representation of character. If, after charging *A.* with an offence, a fact comes to your knowledge proving that he could not have committed it, I think that takes away the probable cause; but it would be very dangerous to hold that the probable cause is removed by a mere representation as to character. Evidence to character is frequently admitted on examinations before magistrates, and no case has ever gone the length of saying that such evidence takes away the probable cause. Character may and ought to have great weight, but still it does not alter the facts, and consequently I conceive that it was not a point for the jury whether in this case the defendant was or ought to have been satisfied.

BOLLAND B.—I am also of opinion that there ought

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to be a new trial. The rule of law laid down in *Johnstone v. Sutton*, applicable to this case, has always been held to be the correct one; it was founded on the authority of *Reynolds v. Kennedy* (a), in which the question was fully considered. One of the grounds of distinction taken in *Johnstone v. Sutton* is, that probable cause is a mixed question of law and fact. In *Vaughan v. Johnson* it was thought to be a question for the jury, in what sense the words were used, and the accompanying circumstances showed that it was impossible for the defendant to have believed that the plaintiff's words were seriously meant as a threat, and consequently there was no probable cause for the arrest. But the case before us does not move upon the facts, for here it is admitted that originally there was probable cause, and it is only on the representation made by the constable as to the plaintiff's character that we are called upon to say that the defendant had no probable cause for preferring the charge against the defendant. Upon that point, for the reasons stated by my lord, I am of opinion that there ought to be a new trial.

ALDERSON B.—I concur in the opinion that there ought to be a new trial. It appears that the facts proved were such as in the opinion of the chief justice amounted at first to a reasonable and probable cause for the defendant to believe that the persons mentioned were about to rob him. Then upon the constable making a representation as to the plaintiff's good character, his own opinion seems to have thought that the reasonable and probable cause was removed. It appears to me, upon the additional facts, in order to have that effect, that the facts to be such as either altered the original facts or showed that they could not possibly have happened.

(a) 1 Wils. 232.

Here the circumstances of suspicion remain the same, the inference from them only is weakened. With respect to the question of malice, if the defendant proceeded, though he believed there was no reasonable or probable cause, I confess I should doubt whether it might not properly be left to the jury to decide whether his conduct was not malicious. If he was in truth satisfied with the representation, the jury might fairly infer that in going on he could only be actuated by a malicious motive.

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GURNEY B.—My dissent from the ruling of the chief justice is confined to the question of reasonable and probable cause. I do not concur in the opinion which he seems to have expressed, that the representation as to character took away the probable cause.

Rule absolute.

WARNER and Others *against* M'KAY.

ASSUMPSIT for goods sold and delivered. Pleas, as to all the money mentioned in the declaration, except as to 85*l.*, first, *non assumpsit*: secondly, pay-
 A cargo of goods was consigned to factors to sell, who on the 6th of *February* sold one parcel to the defendant, and delivered him an invoice in their own names. On the 13th the defendant applied to purchase another parcel, when the factors said they must write to their principals. Some days afterwards they informed defendant of the answer of the principals, and on the 20th the defendant bought a second parcel at the price named by them, and thereupon the factors delivered to him an invoice and a bought note in the name of such principals. The goods were to be paid for at four months in cash. On the same day, and on several occasions afterwards within the four months, the defendant made payments to the factors, but not expressly on account of the goods in question. It was proved, that the practice of the factors, when they sold goods on their own account, to pay advances made by them, was to deliver an invoice in their own names, but when they sold merely as brokers to deliver a bought note also. The owners of the goods having brought an action against the defendant for the price of the parcel sold on the 6th of *February*, the jury found that the factors communicated to the defendant the fact, that they sold the goods for other persons as principals, but that the defendant, on the 6th, and

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ment : thirdly, that the plaintiffs sold the goods in the declaration mentioned, through the agency of certain persons, to wit, Messrs. *Badenoch* and *Jenkinson*, at *Liverpool*, who at the time of the sale and delivery thereof were the factors and agents of the plaintiffs, and intrusted by them as such factors and agents with the said goods, and with the consent of the plaintiffs sold them to the defendant in their own name, as the true and sole owners thereof, and then appeared to be the true and sole owners thereof, by the plaintiffs' consent, and that the plaintiffs did not appear to be the proprietors or owners of the said goods, or interested therein; and that the defendant bought them of *Badenoch* and *Jenkinson* as their own goods, and did not know, and had not the means of knowing, that the goods belonged to the plaintiffs. The plea concluded by averring, that *Badenoch* and *Jenkinson*, at the time of the said sale, was indebted to the defendant in a large sum of money, out of which he proposed to set off the price of the goods. Fourthly, that the defendant having bought the goods of *Badenoch* and *Jenkinson* under the circumstances detailed in the preceding plea, paid them for such goods by his acceptance. The defendant then pleaded payment into court of the 85*l.* The plaintiffs denied the payment alleged in the second plea, replied *de injuriâ* to the third and fourth pleas, and to the last plea, acceptance of the 85*l.* in satisfaction of that amount. At the trial before *Parke B.* at the last *Liverpool* spring assizes, the following facts appeared in evidence.

Towards the end of 1834 the plaintiffs, who were wholesale grocers in *London*, shipped to *Liverpool* a

until the 20th of *February*, *bonâ fide* believed that they sold to pay themselves advances; and that the defendant, using the ordinary precaution of merchants, was not bound to make further inquiry. Held, that the defendant was entitled, as against the plaintiffs, to set off the payments which he had made to the factors.

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cargo of currants, a portion of which were damaged, and employed Messrs. *Badenoch* and *Jenkinson*, brokers at that place, to dispose of the cargo, to whom the bills of lading were indorsed. On the 6th February 1835, *Badenoch* and *Jenkinson* sold the damaged part of the currants to the defendant, a grocer in *Liverpool*, and delivered to him an invoice in their own names. On the 13th the defendant made them an offer for a parcel of undamaged currants at a certain price, when they told him they must write to their principals. Some days afterwards they communicated to him the answer of the plaintiffs demanding a higher price, which the defendant agreed to give, and on the 20th *Badenoch* and *Jenkinson* delivered to him a bought note and invoice, in the names of the plaintiffs as the vendors. Both parcels were to be paid for in cash at four months. On the day last mentioned the defendant, on the application of *Jenkinson*, accepted a bill for 200*l.*, but not expressly on account of the goods in question, and made other advances to *Jenkinson*, which covered the price of the first parcel of currants, with the exception of the 85*l.* paid into court. The defendant paid the plaintiffs the amount of the second parcel according to his contract. It was proved that *Badenoch* and *Jenkinson* sometimes sold goods on their own account, in order to pay themselves advances, and at other times as brokers; and that, in the former case, their practice was to send invoices in their own names, in the latter they delivered also bought notes. The plaintiffs were indebted to *Badenoch* and *Jenkinson* for advances made on this cargo, but to what extent did not appear. The question between the parties was, whether the defendant was entitled as against the plaintiffs to deduct the sum paid by him to *Badenoch* and *Jenkinson* upon the bill of exchange and the other monies which he subse-

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quently advanced to them. The learned baron told the jury, that the bill could not be considered as *payment* for the goods, but that if they were of opinion that *Badenoch* and *Jenkinson* sold the goods in question on their own account, and that the defendant *bonâ fide* believed they had authority to do so, then the plaintiffs were bound by all the equities which existed against *Badenoch* and *Jenkinson*, and must allow the defendant to set off the amount of his advances to them against the goods. The jury found that *Badenoch* and *Jenkinson* had communicated to the defendant the fact, that they sold the goods for other persons as principals, but that the defendant on the 6th of *February*, and until the 20th, *bonâ fide* believed that he was purchasing from *Badenoch* and *Jenkinson*, and that they sold the goods to pay themselves advances—that the defendant, using the ordinary precaution of merchants, was not bound to make any further inquiry on the 20th, when he accepted the bill. The verdict upon this finding was entered for the defendant, with leave for the plaintiffs to move to enter a verdict for 163*l.*, if the court should think that they were entitled, under the circumstances, to recover.

Cresswell, in *Easter* term, obtained a rule *nisi* accordingly, and contended that the learned judge had misdirected the jury.

Alexander and *Crompton* now showed cause. It is submitted that this verdict ought not to be disturbed. The defendant is clearly entitled to set off his payments to *Badenoch* and *Jenkinson* against the price of the goods. It was proved that *Badenoch* and *Jenkinson* were in the habit, where they sold as principals, to deliver an invoice in their own names; and where as brokers, to deliver bought notes; and in the

present instance they adopted the former mode of dealing with respect to the first parcel of goods, and the latter mode as regarded the second parcel. The question arising in this case has never been precisely determined, but it falls within rules of law which are well defined and understood. The character of broker is materially different from that of factor, and therefore where a broker sells goods without disclosing the name of his principal, it is held that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him, against the demand for the price of the goods made by the principal; *Baring v. Corrie* (a). A factor, on the other hand, has a right to sell in his own name as principal, being trusted with the possession of the goods, the *indicia* of the property, and the purchaser has a right to consider him as the principal, unless the factor discloses that he is acting merely as the agent of his agent, and not on his own account; *Hudson v. Granger* (b), *Carr v. Hinchliff* (c). The question is, whether this case is taken out of the general rule of law, by *Badenoch* and *Jenkinson* communicating to the defendant that the goods were the plaintiffs. The communication gave no information to the defendant from which he could infer that the factors were acting improperly towards their principals; though he is told the goods belonged to the plaintiffs, he has no reason to believe that the factors had not a right to sell them. Were the factors acting within the scope of their authority? No information is given to the defendant that they were acting beyond it; and the course of dealing adopted by them was equivalent to an express declaration, that although the goods belonged to others, they had a right to sell them. The defendant was not bound to write to *Lon-*

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(a) 2 B. & Ald. 137.

(b) 5 B. & Ald. 27.

(c) 4 B. & C. 547.

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don to ask the plaintiffs the state of the accounts between them and the factors; for the information given is perfectly consistent with the belief that they were acting within their authority. The jury found expressly that the defendant *bonâ fide* believed that *Badenoch* and *Jenkinson* were selling to pay advances, and that he was not bound as a merchant to make further inquiry. They have, therefore, found that he made the payments under a *bonâ fide* belief that the state of accounts between the factors and their principals was such as to entitle the former to deal with the goods as their own, and that he was not called upon to inquire whether the amount of the goods would more than cover the debt due from the principals to the factor. [*Parke* B. There was no question left to the jury as to the precise amount due to the factors; I did not think it material.] This case is distinguishable from *Moore v. Clementson* (a); for there the purchaser had express notice that the goods belonged to a third party. [Lord *Abinger* C. B. That case is more like the present than any other. It does not seem consistent with some other cases. *Parke* B. Lord *Ellenborough* appears to have considered that the notice was given before there was any binding contract between the parties. On that supposition it is consistent with the other authorities.] That case seems to have been considered as a sale by the principal, whereas here *Badenoch* and *Jenkinson* were selling on their own account; for that is the effect of the evidence, and of the finding of the jury. Ever since the case of *Drinkwater v. Goodwin* (b) the law has been taken to be, that as between a factor and his principal, the former has a right to sell goods in his own name, by virtue of his general authority, and has a lien on the goods and on the price of them, for a general balance of accounts.

(a) 2 Camp. 22.

(b) Cowp. 251.

So here *Badenoch* and *Jenkinson* either sold under their general authority as factors, or if they had a lien, to indemnify themselves. In *Coates v. Lewes* (a), where the owner of the goods allowed a *broker* to sell them in his own name as principal, Lord *Ellenborough* held, that the buyers were discharged by payment to him. [Lord *Abinger* C. B. In that case the broker was a factor *pro hac vice*.] That case, therefore, is the same as a factor selling in his own name. It is a fallacy to say that the factors in the present case disclosed the names of their principals. The authorities as to the disclosure of the principals, are cases where the factors have made it known that they were selling for their principals; whereas here the factors, by their conduct, induced the defendant to believe that they were selling on their own account. This case, consequently, falls within the general rule; which is, that where a purchaser is led to give credit to the factor by his having possession of the goods, and holding himself out as the principal, the party giving him such a general authority is, as between two innocent parties, the one who ought to suffer.

Cresswell and *Wightman* contra. This rule was moved on the ground of misdirection by the learned judge, and consequently is not met by the finding of the jury, which was subsequent to such misdirection. It is submitted that the defendant cannot, under the circumstances, avail himself of his payments to the factors. It was not expressly decided, in *Drinkwater v. Goodwin*, that a factor has a right of lien; that case may, therefore, be laid out of consideration. Unless there is a course of dealing authorizing it, a factor has no right to sell the goods of the principal. [*Parke* B. How is

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(a) 1 Camp. 444.

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he to reimburse himself for advances?] Where a principal sends an assorted cargo, with a limit as to price, the factor has no right to sell a portion of it to repay his own advances. [Lord Abinger C B. He may have no right as between himself and the principal, but this does not bind other parties.] The ground on which the cases, which have been referred to on the other side, were decided, will be found to be the same in substance as that taken in *George v. Claggett* (a), namely, that the purchaser had no notice at all that the factor was not the principal. There is a second class of cases, which establish that where a principal intrusts a factor with goods for sale, the latter has a right to sell, and the purchaser to pay for them, where the payment is made according to the contract authorized by the principal. The present case does not fall within that class of cases, for there was no payment pursuant to the contract, but a mere advance of money by the defendant. Neither is it within *George v. Claggett*, for he had no notice of the principals. The factors *primâ facie* have no right to sell, because they had principals in London, and that being made known to the defendant, he was bound to inquire whether they had authority to sell or not. With respect to the finding of the jury, if they had found that the defendant had no notice of the plaintiffs, and that he believed they were selling for themselves, that might have been sufficient, but the jury had no authority to consider whether the defendant believed that *Badenoch* and *Jenkinson* had no right to sell on their own account. The belief of the defendant is immaterial. Where a buyer rests satisfied with the statement of the factor, after notice of a principal, he must take the responsibility. A broker *primâ facie* is selling for another, and so is a factor who discloses that he has a principal; and here, where

(a) 7 T. R. 359; Peake's Addit. N. P. C. 131.

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Badenoch and *Jenkinson* informed the defendant that their principals lived in *London*, the distinction between them and brokers ceased. In *Coates v. Lewes*, the party, though a broker, was, in that particular instance, acting as a factor. *Moore v. Clementson* is strictly in point. So in *Westwood v. Bell* (a), it was held, that where a party effects a policy with an insurance broker, without notice that he is not the principal, such broker has a lien upon the policy as against the principal, for his general balance. [Lord *Abinger* C.B. Have you any case where the factor, known as such, has sold goods in his own name without notice of his principal, and payment to him before the money was due, according to the contract, has been set aside?] No, but it is clear, on principle, that such a payment is not good. [*Parke* B. Here the factors sell the goods as their own. The question is, whether the defendant, having been informed that the goods belonged to principals in *London*, should not have made further inquiry?] It is submitted, that to make this payment on account a payment in respect of the goods, it should have been shown that the defendant had no knowledge that the goods belonged to third parties. Although the defendant had known that there was nothing due from the principals to the factors, if he had made the payment according to the contract, he would have been discharged, but, under the circumstances, he is clearly responsible. In many of the cases it will be found that the factor acted not simply as such, but under a *del credere* commission, which renders him absolutely liable to the owner. [*Parke* B. In *George v. Claggett* (b) Lord *Kenyon* says that makes no difference.] In *Morris v. Cleasley* (c) *Bayley* J. seems to have thought it did. [Lord *Abinger* C.B. That circum-

(a) 4 Camp. 349.

(b) Peake's Addit. N. P. C. 134.

(c) 1 M. & S. 576. But see 4 M. & S. 566.

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stance cannot have any effect as between the factor and the purchaser, for the latter does not know whether the former has a *del credere* commission or not.] It would be going much farther than any case has yet done, to hold that this defendant after notice is entitled to treat the factors as the principals, so as to avail himself, as against the plaintiffs, of payments made to them.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

LORD ABINGER C. B.—(After stating the facts, his lordship proceeded:)—The question in this case was, whether the defendant had a right to say that he had paid the factors for these goods. The jury have found that he had notice that they belonged to the plaintiffs, but that he was not bound to make further inquiry. If this had been simply the case of a sale of goods by factors, in their own names, there would have been no difficulty in saying that the payment to them was valid. The doubt has arisen from the circumstance that the defendant was informed that the goods belonged, not to *Badenoch* and *Jenkinson*, but to the plaintiffs. It appears, however, that the factors were in the habit of selling goods in their own names when they had any claim against the owner, and that, in point of fact, they sold these goods in their own names; and after the finding of the jury that the defendant believed they had authority so to sell, and that he was not bound to inquire further, we see no ground for disturbing the verdict. The rule consequently will be discharged.

Rule discharged.

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ROSE and Others *against* JOHN EDWARDS.

ASSUMPSIT by indorsee against indorser, on a bill of exchange for 25*l.* drawn by *Davies* on *Moore*, payable four months after date to the drawer's order, accepted by *Moore*, indorsed by *Davies* to the defendant, and by the defendant to the plaintiffs. Counts for goods sold and delivered, and on an account stated. Pleas to the first count: first, that he did not indorse the bill to the plaintiffs; and secondly, that he had not due notice of dishonour, with non assumpsit to the rest of the declaration. The cause was tried at the *Midsummer* sittings, before Lord *Abinger* C. B. The plaintiffs were stated to be china makers in *Staffordshire*, having an agent in *London* to carry on the business there. *John Edwards* (the defendant) was a carver and gilder, living at No. 17, *Shepherd's Market, Oxford Street*; his brother *William* had before his insolvency kept a china-shop at No. 7 in the same market. *William's* creditors agreed to receive 5*s.* in the pound composition, of which *John* (the defendant) was to pay 2*s.* 6*d.*, and himself 2*s.* 6*d.* *William's* china business was assigned to the defendant, who carried it on by his wife, who appeared in the shop, as did also *William* and his wife. The defendant paid his share, viz. 2*s.* 6*d.* in the pound. The insolvent, *William*, did not pay his share (about 1*l.*) but offered the plaintiffs' agent the bill now sued on in payment of the other 2*s.* 6*d.*; at the same time

An insolvent shopkeeper assigned his stock and business to his brother, and compounded with his creditors at 5*s.* in the pound, of which his brother was to pay half and himself the rest. The brother's name was placed over the door, and his wife sometimes went there, but insolvent and his wife continued to manage the business of the shop, for one of the insolvent's creditors went to him at the shop, and pressed him to pay 1*l.* his share of the composition. The insolvent offered him in payment a bill of exchange for 25*l.*, upon which his brother's name had been indorsed without his authority. The insolvent and his brother's wife then also proposed to the creditor that he should supply goods to the amount of the balance due; upon this, the creditor agreed to the terms, took the bill, and sent in goods to the shop accordingly. The bill being dishonoured, the solvent brother was sued on it, and also for goods sold and delivered; but obtained a verdict on two pleas,—that he never indorsed the bill, and that no notice of dishonour had been given him; however, evidence having been adduced on the count for goods sold and delivered, that the solvent brother had declared himself responsible for all orders "given at that shop," the jury found that the insolvent had a general authority to buy goods for his brother, and that the plaintiff sold his goods on the credit of the latter as well as of the bill. Held, that the plaintiff was entitled to recover the value of the goods.

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he directed the defendant's wife a supply of china to the shop to the extent of the balance, about 14*l.* Upon the plaintiffs' agent received the bill from *William* shop and sent in the goods. At this time the defendant's name appeared on the bill as indorser, but it proved that it was not in his writing or by his authority. The plaintiffs subsequently furnished *William* with goods to the extent of 14*l.* 0*s.* 8*d.* The defendant's name appeared over the shop door, and a witness swore, that, having no intention to trust *William*, asked the defendant who would be answerable for the goods supplied at No. 17; the defendant answered "he would be liable for orders for goods given at the shop:" he had also in several instances paid for goods so furnished. No notice of dishonour being proved at the trial, the plaintiffs' demand was confined to 14*l.* for goods sold and delivered at the shop; to which the defendant answered, first, that the plaintiffs had taken the bill in payment for the goods supplied, and made it their own by their laches; and secondly, that he, *John Edwards*, was not liable for these goods which had been ordered by *William* and were afterwards disposed of by him. The plaintiffs replied, that if the bill amounted to a payment, it should have been so pleaded. Lord *Abinger* agreed to that argument, but admitted the defendant's proof of the above facts in mitigation of damages, telling the jury that if they were of opinion that *William Edwards*, or the defendant's wife, had a general authority to buy fresh goods for the defendant on his credit, they should find a verdict for the plaintiffs on the second count, viz. for goods sold and delivered, with nominal damages, and leave to them to move to enter a verdict for 14*l.* 0*s.* 8*d.* and to the defendant to move to enter a verdict general for himself. Verdict for plaintiffs on the second count. Cross rules were afterwards granted, according to which leave reserved.

Kelly and *R. V. Richards* for the plaintiffs, were called on to support their rule. Goods were sold and delivered by the plaintiffs to the defendant, and the jury have found that the defendant authorized the order of them. Whether they were delivered on the credit of this bill is not material, for if it had not been delivered, or if the indorsement of it was forged so as to make it a nullity, the defendant would still be liable for these goods so sold and delivered. As *William Edwards* and the defendant's wife are found to have had authority to contract for these goods, might they not contract to pay for them in this manner? Had they been bought before, *William* might have paid for them with money from the till, or by a bill of exchange: but these goods were not sold for the bill, that being only retained by the plaintiffs as security for the goods. [*Alderson* B. You say it must be taken on the second issue that the goods were sold and delivered to the defendant. *Parke* B. The first point is, whether, putting the bill itself out of the case, the jury could give their verdict on this evidence. Then was there authority from the defendant to his wife or *William*, sufficient to bind the defendant in this way. Lord *Abinger* C. B. *Willatt's* evidence only proved the defendant's authority to order goods for the shop No. 17, if so ordered in the ordinary course of the trade. Now the defendant contended that this was not an order made in the usual course. A shopman is to sell goods, not to pledge his employer to buy them. *Parke* B. Is it not a question of fact whether the absence of the indorsement of a party who pays for goods by a bill, does not show it to have been taken in exchange for them out and out, the seller being content to take on himself all risk on the bill? In *Ex parte Blackburne* (a), Lord *Eldon* says, "I take it to be now clearly settled, that if there be an antecedent

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debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that if there is no antecedent debt, and *A.* carries a bill to *B.* to be discounted, and *B.* does not take *A.*'s name on the bill, if it is dishonoured there is no demand; for there was no relation between the parties except that transaction, and the circumstance of not taking the name on the bill is evidence of a purchase of the bill." As the law implies a contract that goods sold shall be paid for, the buyer may agree that the payment shall be by a particular bill.] Here the bill was taken in exchange for the goods, which bill purported to be indorsed by the defendant, but turned out not to be so, and was so far a nullity. Then the case falls within the first part of Lord *Eldon*'s position. [*Parke* B. Had it not been indorsed till after the delivery of the goods the case would have stood differently.] If this was not a purchase of the bill by the goods furnished, it should have been pleaded to have been delivered in satisfaction. [Lord *Abinger* C. B. The plaintiffs cannot retain the bill for the purpose of paying *William*'s share of the composition, and repudiate it for another. It cannot be a nullity as against the drawer and acceptor, as to *William*'s debt.

Platt and *Miller* contra. There is no evidence that any authority, express or implied, was conferred by the defendant *John Edwards* on his wife or *William Edwards*, to enter into any contract like the present,—viz. a contract, not for purchase of goods, but for a particular mode of payment for them. An agent can only bind his principal by acts done in the usual way of business, *Wiltshire* v. *Sims* (a). In *Guerriero* v. *Peile* (b), *Holroyd* J. says, "Where the factor sells

(a) 1 Camp. 258.

(b) 3 B. & Ald. 616.

the goods of his principal, it is his duty to keep that sale wholly unconnected, and not to mix any other matters with it to the detriment of the principal." But here *William* was the party primarily indebted for the amount of his own composition; and then, professing to buy goods for the defendant, offers to pay his own original debt with a bill in his hands which belonged to the defendant; but *William* had no authority to bind his brother to pay his, *William's*, own debt. But further, this was a barter of the bill for part of its value in goods, nor can the defendant be liable on the bill, his indorsement being a forgery. It resembles the delivery of one chattel in exchange for another.

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Cur. adv. vult.

LORD ABINGER C. B. afterwards delivered the judgment of the court. The question is, whether the verdict ought to be entered for the plaintiffs for 14*l.* 0*s.* 8*d.*, or whether it ought to be entered for the defendant. The case presents several points which seem to be resolved into this:—*William Edwards* had carried on business as a chinaman, and had become insolvent. He assigned his business to the defendant, *John Edwards*, and agreed to pay a composition of 2*s.* 6*d.* in the pound. The name of *John* was then put over the shop, and *William* remained to conduct the business, the wife of *John* going there occasionally. It appeared by the evidence that *John* admitted his responsibility for all the goods to be supplied at the shop. Under these circumstances, the plaintiffs, who were creditors of *William*, go to demand from him his payment of 2*s.* 6*d.* in the pound. He had obtained a bill of exchange from a person indebted to him for a sum exceeding the amount due to the plaintiffs. On their application he proposed that they should take the bill as a payment, and supply

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the remainder in goods of the same kind as they had sent previously. The plaintiffs took the bill to consider about the proposal, and on the application of *William Edwards* and the defendant's wife, afterwards sent in the goods. When the bill was handed over to the plaintiffs, the name of *John Edwards* had been put upon it without the defendant's authority. He was not, therefore, the indorser of the bill. So the jury have found. It also appeared that no notice of dishonour had been given to the defendant; but the question is, whether *John* is liable for the goods sold by the plaintiffs. If these goods had been delivered on the credit of the bill, and not at all on the credit of *John* personally, the defendant would be entitled to a verdict. But it appears manifestly that the plaintiffs did not take the bill entirely on the credit of the other names which were upon it, independently of the defendant's, but received it with the belief that his name was also upon it; and therefore must be taken to have agreed to sell the goods on the credit of the defendant. We cannot say that there was not evidence to go to the jury to support the count for goods sold and delivered. The rule for entering a verdict for the plaintiffs for 14*l.* 0*s.* 8*d.* will therefore be made absolute. The other rule must be discharged.

Rules accordingly.

The ATTORNEY-GENERAL *against* PARSONS.

Where in an
information in
intrusion the
venue is laid

THIS was an information of intrusion against the defendant for a trespass on the waste of the manor of in the county in which the land lies, the court will order it to be tried in another county, without changing the venue, on suggestion by the Attorney-General of facts tending to show that an impartial trial cannot be had in the first county.

Resemblance of such an information to trespass.

Iscoed, in the county of *Radnor*, belonging to the crown.
The venue was laid in *Radnorshire*.

The *Attorney-General* moved that the inquisition be taken in *Herefordshire*, on an affidavit that there were not forty-eight special jurymen in *Radnorshire*, and that there was a strong feeling in that county in favour of the defendant. This species of information is not a real but a personal action, resembling trespass in all its points (a).

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Per Curiam.—(Lord ABINGER C. B., BOLLAND and ALDERSON Bs.)—The crown may lay the venue in any county, without regard to the local situs of the lands. Here it is laid in *Radnorshire*; but the motion is not to change the venue, being only that the trial may take place elsewhere, and is founded on a suggestion couched in the form warranted by the records in this court.

Motion granted.


(a) See Com. Dig. and Vin. Ab. tits. Prerogative, Intrusion; Chitty Jan. on the Prerogative of the Crown; Hardres, 460; Saville, 9; *Rex v. Hunt*, 3 B. & Ald. 444; 2 Chit. 130, S. C.

M'GAHEY, Vestry Clerk of St. Pancras parish, *against*
ALSTON and SEWELL.

DEBT on bond bearing date 1 *January* 1834, and In an action brought by a vestry clerk of a parish, under a clause in a local act, by which the directors and overseers of the poor were to sue and be sued in the name of their clerk, the defendant pleaded that the plaintiff was not vestry clerk. Held, that proof of his having acted as vestry clerk was sufficient *prima facie* evidence of his being regularly appointed such clerk.

One of the directors of the vestry was called for the plaintiff, to prove that he had examined certain accounts rendered by the defendant, but had never allowed them. Held, that he was a competent witness, though one of the real plaintiffs, not being personally liable to costs.

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poor of the parish of *St. Pancras, Middlesex*, and their successors, in the penal sum of 500*l.* Pleas: first, that the plaintiff was not vestry clerk of the parish; secondly, that *Alston* had duly performed the conditions of the bond. Issues were joined on these pleas (*a*), and were tried at the *Middlesex* sittings in last *Trinity* term before *Gurney B.* The main question was, whether the defendant *Alston*, who had been appointed paying agent or clerk for the parish, had a right to retain a certain sum for salary as vestry clerk, Mr. *Scadding* being at that time vestry clerk, and it being necessary that he should countersign every order for payment of any money by *Alston*. It happened that *Scadding* having resigned his vestry-clerkship, the defendant *Alston* was, by resolution of the directors of the poor, appointed temporary vestry clerk. The vestry afterwards adopted this resolution, but reduced the salary from 500*l.* to 300*l.* a year. The defendant *Alston* claimed at the rate of 500*l.* a year to the time of the adopting the resolution by the vestry; whereas the plaintiff contended that this reduced salary began from the resignation of *Scadding*. The defendant *Alston* entered on his accounts the sum of 34*l.* 5*s.* as paid to himself for his salary at the higher rate, and retained that sum out of the parish funds. A committee of the vestry examined his accounts and assented to them (*b*), and on their being submitted to the auditors, one of them signed them. Finally, however, the vestry refused to pass *Alston's* accounts, and dismissed him from his office. To prove that the plaintiff was vestry clerk of *St. Pancras* parish, he was called as a witness pursuant to the *St. Pancras Vestry Act 59 Geo. 3. c. xxxix. s. 16.*, and stated himself to be such vestry clerk, and that he acted as such. By another clause of that act

(*a*) A third special plea had been held bad on demurrer. *S.C. ante*, 705.

(*b*) This was denied by the plaintiff.

the directors and overseers of the poor were to sue and be sued in the name of their vestry clerk. It was objected that the plaintiff's appointment should have been proved, but the learned baron held the proof sufficient. *Bradley*, one of the vestry committee, and chairman of the committee of the directors who had examined the accounts, was then called to prove that he had objected to the above item, and had therefore not conclusively allowed the accounts. On objection to his competency, the learned baron held him to be a competent witness, and directed the jury to find whether the defendant *Alston* had or had not retained any part of the parish monies on account of his salary; observing that he had no right to retain any such money at the higher amount of salary. Verdict for the plaintiff.


Sir *William Follett* moved for a new trial, on the ground that the evidence of the plaintiff had been improperly received to prove the affirmative of the first issue, that he was the vestry clerk. For it was not sufficient to prove his acting as such, without producing the books containing his appointment to that office by at least thirteen vestrymen, in pursuance of s. 19.; such books being made evidence by another section. [*Parke B.* Was not the plaintiff's acting in such a character sufficient *primâ facie* evidence of his being entitled to the office by regular appointment? Where the acts of constables and magistrates come collaterally in question, there, though they are defendants, proof that they acted as such has always been held sufficient.] Upon the fact of the plaintiff being legally clothed with this office depends his right to sue; how then can his being specially enabled to give evidence in an action brought by himself, capacitate him to prove, without more, what office he himself fills, and thus affirm the issue he himself

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has raised? That fact distinguishes this from any case where magistrates, constables, and other parties in their offices, are made defendants for an act done; in such a case, their acting in their offices is sufficient *prima facie* evidence for the plaintiff. Had the plaintiff succeeded in his slander against the defendant, he must have proved that the defendant was acting in his office, he must have proved that the defendant was appointed; because there, as in this case, the defendant must fail if he was not lawfully invested with the office. See *Sellers v. Till* (a), *Collins v. Carnegie* (b). [Parkin v. The Corporation of the City of London]. The physician, who was the plaintiff in the last cited case, was not a public officer; whereas a vestry clerk is a public officer as a constable, and the act makes him a mere instrument, whose name is to be used in actions though not brought for his benefit. In *Curtis v. The Corporation of the City of London* (c), which was an action for publishing a libel against the plaintiff as an assistant overseer, the plaintiff proved his appointment by the magistrates, but Tindal C. J. intimated that it would have been sufficient for him in the first instance to show that he was acting in the capacity of assistant overseer. Though in an action by a public officer it might in general be sufficient for him to prove his acting in that capacity, it is submitted to be otherwise where his capacity to do so is put in issue. But is a vestry such a public body that its clerk is a public officer? *Curtis v. The Corporation of the City of London* (c) shows, that had the plaintiff been in the office of treasurer to the company been sufficient to establish the point as to the legality of the appointment signed by a majority of commissioners would not have arisen. If the mere oath of the plaintiff himself, that he acted as vestry clerk, is held sufficient, any person may make a plaintiff who has acted once in that capacity. Then as the local act makes a written appointment necessary, and directs it to be entered in the book

(a) 4 B. & Cr. 655.

(b) 1 Ad. & El. 695.

(c) 2 Bing. N. C. 228.

(d) 7 B. & Cr. 314.

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which are made evidence of such appointment, they should have been produced. The character in which the plaintiff sues being the foundation of the action, and being put distinctly in issue, should have been strictly proved (a). [*Parke B.* It is an old established principle of evidence, that it is sufficient to show a public officer to have acted in the character which is stated to belong to him. The rule is different in persons acting in private capacities, as physicians, &c. *Bolland B.* In *Berryman v. Wise* (b), *Buller J.* said, "that in the case of all peace officers, justices of peace, constables, &c. it was sufficient to prove that they acted in those characters, without producing their appointments." *Lord Abinger C. B.* Suppose that though irregularly appointed, he continued to act, could not he sue? No other person having acted as vestry clerk, it would be a question for the jury whether he was such. As he does not sue for his own benefit, this is a matter incidental to his acting in the office, and he has no pecuniary interest in the action.]

Further, *Bradley* could not be a competent witness, being one of the directors of the poor, who are the parties really interested as plaintiffs. Though the plaintiff on the record, being a mere nominal representative of the directors, may, by special enactment, give evidence in support of their action, that does not extend to every vestryman and director of the poor. [*Parke B.* *Bradley* is not either of the parties named on the record, and has no direct interest in the event. *Fletcher v. Greenwell* (c) is expressly in

(a) In an action for a penalty for acting as a justice without a qualification, *Wood B.* held, at *nisi prius*, that the defendant's having acted as a justice did not entitle him to notice of action as such; the question being, whether he was a magistrate. *Wright v. Horton*, 1 Holt's C. N. P. 458.

(b) 4 T. R. 366.

(c) 5 Tyr. 316. Action for goods supplied to the directors of the poor of a parish. The defendant was their vestry clerk, in whose name a local act provided that they should sue and be sued. They were not made personally

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point.] The vestry clerk, as he sues in an official character, is not liable for costs except to the extent of parish funds in his hands (a), but the directors must be (b). [Lord Abinger C. B. The witness is not a party on the record, nor has he personal or pecuniary interest in the cause, being a mere creation of the act to work out its machinery.] In *Whitmore v. Wilks* (c), which was an action by paving trustees, who were empowered by statute to sue in the name of their treasurer, Lord Tenterden expressed himself of opinion that one of the body could not be a witness for the rest. [Parke B. That case was commented on in *Fletcher v. Greenwell*; here, all is for the benefit of the public, without any private interest of the plaintiff.]

Lastly, there was a misdirection, the issue being, not whether *Alston* was justified in retaining at a larger rate for his salary, but whether his accounts had been rendered to and ratified by the directors, they being the persons to pay the salary. That ratification had taken place and was final. [Parke B. They were only to pay legal salaries.] But even if the question was, whether he was justified in retaining for his salary at the rate of 500*l.* per annum, the evidence is in his favour. For having been appointed vestry clerk, he was entitled to his predecessor's salary till the directors resolved to reduce it.

Lord ABINGER C. B.—The argument has not convinced me that a rule ought to be granted.

liable by any clause :—Held, that a party who was a director of the poor at the time the goods were furnished, but had ceased to be so before the trial, was a competent witness as an inhabitant who, under a section of the act, was competent to give evidence.

(a) See *Wormwell v. Hailstone*, 6 Bing. 668, cited by Alderson B. in *Emery v. Day*, 4 Tyr. 698.

(b) Viz. by mandamus, *Corpe v. Glyn*, 3 B. & Adol. 801; or bill in equity, per Tindal C. J. 6 Bing. 676.


(c) M. & Malk. 214, 220.

PARKE B.—I am of opinion that the first objection cannot be sustained, and that the proof of the plaintiff having acted as vestry clerk was sufficient. There can be no doubt that the plaintiff is a public parochial officer; and the rule is, that all persons who are proved to have acted as public officers, are presumed to have been duly appointed to their offices, unless the contrary is shown. The fact that the action is brought in the officer's name affords no ground of objection. In actions against justices and constables, proof that they acted as such is always sufficient *primâ facie* evidence. As to the point whether *Bradley* was a competent witness, *Fletcher v. Greenwell*(a) is a distinct authority that he was. The directors are not parties to the record either nominally or substantially. As to the remaining point whether *Alston* was entitled to claim credit for 34*l.* 5*s.* 0*d.* for his salary at the rate of 500*l.* per annum, his claim to it was grounded on its allowance by the directors; but the vestry only could settle the amount of it. Nor was this item allowed by the vestry at the settlement of his accounts; and if it had, I question whether the defendant would have been exonerated, for the retainer of this sum was equivalent to a payment to a third person, by the defendant, of money, the demand of which by such person, the defendant must be taken to have known not to have been sanctioned by the proper authority.

Rule refused.

On the same day, *Platt*, for *Sewell*, the surety of *Alston*, moved for and obtained a rule *nisi* for a new trial, on the ground that the accounts of *Alston* put in to show his admission of having received monies for which he had not accounted, were not evidence to fix

(a) 5 Tyr. 315. Stated, *ante*, 985, n.

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Sewell as his surety. He cited *Smith v. Whittingham* (a), *Goss v. Watlington* (b), *Middleton v. Melton* (c): but the rule was afterwards discharged, for on reading the report it appeared that other evidence was produced besides *Alston's* accounts to show his receipt of the money in question. The argument on the rule did not come on within the period comprised in these reports, but will be found in the second volume of Messrs. *Meeson and Welsby's Reports of Michaelmas term, 1836.*

(a) 6 C. & P. 78. (b) 3 Br. & Bing. 132. (c) 10 B. & Cr. 317.

BROCKBANK against MYERS (d).

It will be referred to the master to take an account of the rents and profits of land received by the plaintiff under an *elegit*, and to make such allowances as a court of equity would do, so as to let the defendant into possession if the debt and costs should have been paid without bringing ejectment or *scire facias ad computandum et reha-bendum terram.*

THE judgment was of *Michaelmas term 1827* for 10*l.* damages and 167*l.* 8*s.* costs; after a small levy under a *fi. fa.* an *elegit* had issued, under which a moiety of the defendant's lands of the annual value of 40*l.* 10*s.*, as found by an inquisition taken by the under-sheriff, were extended. Plaintiff recovered possession in *November 1829*, and entered into the receipt of the rents and profits of the said moiety so extended, and remained therein till 14 *May 1835*. Several affidavits showed receipt of rents and other profits by the plaintiff, disclosing that he had, or might have, received rents and profits of the said lands so extended, to a larger amount than the balance of damages and costs so remaining due to him on his judgment, and that such judgment was fully satisfied. The plaintiff's affidavits stated facts to prove that he had not received the sum recovered by the judgment, and set out accounts of sums actually levied by the *fi. fa.*, as well as sums received and paid on account of the

(d) *Trinity term, 1835, June 12.*

lands extended; also a course of vexatious proceedings by the defendant to prevent the plaintiff from letting it or getting its produce; and a taking possession by defendant of part by turning out plaintiff's tenant, which led to actions of ejectment and trespass against him.

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*Wightman* for the defendant obtained a rule to show cause why it should not be referred to the master to take an account of the rents and profits of the defendant's lands received by the plaintiff under the writ of *elegit* issued in this cause; and why the plaintiff should not deliver to the defendant the possession of the lands extended, if it shall appear that all the monies due to the plaintiff have been received by him; and if it shall appear that more than the amount due has been received, then why the plaintiff should not refund to the defendant the overplus.

*Crompton* showed cause. This is not an *elegit* on a statute merchant, &c. but merely on a judgment where the defendant had the remedy of ejectment in his own hands, without being driven to a *scire facias ad computandum et rehabendum terram* (a), or to the inquiry consequent thereon. Why not have gone into equity? [*Parke* B. Take it before the master of this court in equity.]

*Wightman* in support of the rule. Had the defendant brought ejectment, he might have confined him strictly to the value at which the land was extended. He cited *Price v. Varney* (b).

PARKE B.—Refer the whole to the master of this court, to be assisted by its master in equity, and to make all the allowances which would be made in a

(a) See 2 Wms. Saunders, 72, in notis.

(b) 3 B. & Cr. 733.

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court of equity. The defendant to pay the costs of his application, being in his own relief.

The master afterwards reported 217*l.* due to the plaintiff.

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JOSEPH HART *against* MINORS.

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*The papers necessary to complete the report of this case could not be obtained in Easter term 1834, when it was argued.*

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Where an executor having called the testator's legatees together, exhibited accounts of the assets and his disbursements, and paid to several the sums due, but retained the legacy payable to one of them who was absent, charging himself in his account with the amount so retained:—  
Held, that he was liable to the legatee in *assumpsit* for so much money had and received, and on the account stated.

**A**SSUMPSIT. Counts for money lent, money paid, money had and received, and on account stated.  
Plea: *non assumpsit* pleaded before the new rules.  
The fact which appeared at the trial before *Taunton J.* at the *Derbyshire* summer assizes in 1833, were these. *Ellaby*, by his will dated in *November* 1830, bequeathed, subject to certain debts and legacies, &c., all the residue of his personal estate to the defendant and one *Turner*, executors of his will, on trust to divide the same into two equal parts, and to pay and divide one of such half parts unto and amongst certain persons mentioned in the will, and the other half part into six equal parts or shares, and to pay one of such last-mentioned parts or share unto each of his cousins, *Joseph Hart* the plaintiff, *Edward, Thomas, John* and *William*, and the remaining sixth part as therein mentioned. The testator died soon after. *Turner* did not act, and the defendant alone proved the will and acted under it. On 13 *October* 1831 he exhibited at a meeting of parties claiming under the will, an account, charging himself with 2375*l.* assets; and paid some of the legatees 179*l.* 10*s.* each, as part of their shares of the residue. When he was about to pay the plaintiff, *Blair*, a creditor of his,

told the defendant not to pay him. He desisted accordingly, and the plaintiff was arrested at the suit of *Blair* and remained in *Stafford* gaol at the time he brought this action. On the 16th *October* the defendant told *William Hart* he would endeavour to see *R.* his attorney, and that he would send *R.* over to pay the money. He did not do so; but on 14 *March* 1832 wrote this letter to the plaintiff:—

“ Sir,

*Knippersley, 14 March 1832.*

“ I have this day received particular orders from Mr. *Blair* not to pay you and your brothers their legacies. If I do I shall stand a chance to have to pay over again. I have pressed them months back to pay you, *and the money has been ready*. I hope you will not blame me, as the fault is not mine. What Mr. *Blair* means to do, I cannot tell you, but shall be very glad when the business is settled. Sorry your legacies have not been paid; left money with Mr. *R.* and expected you to receive it the beginning of this week, but I find that is not the case.—Your’s

“ *W. T. Minors.*”

Another meeting of claimants on 23 *March* 1832 was attended by the plaintiff’s brother, *William*, to receive his further balance of the residue. The defendant gave him a check for 7*l.*, and the defendant’s account, as executor, which he said was his account with the residuary legatees, and was right. He also said he had the money for the plaintiff, *Joseph*, and should like to pay him, but was directed to the contrary by Mr. *Blair*. The account was headed as by Mr. *W. T. Minors*, acting executor of the late Mr. *G. Ellaby*, deceased, with his residuary legatees. The defendant debited himself in it with “ Balance of account rendered the 13th *October* 1831—2375*l.* 13*s.* 3½*d.*” and credited himself with several disbursements, including “ 1831, By cash for legacy duties, 113*l.* 13*s.*” A supplemental account, dated *March* 23, 1832, was subjoined, which credited the defendant thus:—“ By cash retained for Mr. *Edward Hart* 179*l.* 10*s.*, by ditto ditto

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for Mr. *Thomas Hart* 179*l.* 10*s.*, by ditto ditto for Mr. *Joseph Hart* (the plaintiff) 179*l.* 10*s.*” On this evidence the defendant’s counsel contended for a nonsuit, citing *Deeks v. Strutt* (a). The learned judge nonsuited the plaintiff, being of opinion that the action was for a legacy, but gave leave to the defendant to move to enter a verdict for 185*l.* 10*s.* A rule having been granted accordingly,

*Jervis* and *M. D. Hill* showed cause on the first day of *Easter* term 1834. The plaintiff will rely on *Hawker v. Saunders* (b) and *Atkins v. Hill* (c), to show that a general legacy may be recovered by an action at law, where the executor, in consideration of his possession of assets, has promised to pay it. But though the action would lie for a specific legacy after assent by the executor (d), it will not for a general legacy since *Deeks v. Strutt*. For though the judgment of *Grose J.* in that case led to an opinion that the action would lie where the executor made an express promise, *Farish v. Wilson* (e) is a direct authority the other way, being a case in which Lord *Kenyon*, after alluding to 2 *Siderfin*, 285, as the single case in which it had been said that an action would lie for a legacy, added, that the very judges who so determined that case had more than a doubt on their minds afterwards. *Jones v. Tanner* (f) also establishes that no action at law will lie against the administrator or executor for a distributive share of an intestate’s property, though after an express promise to pay. There *Littledale J.* said expressly, that Lord *Kenyon*’s opinion in *Deeks v. Strutt* did not proceed on the absence of an express promise by the executor to pay, and had always been considered as an unqualified

(a) 5 T. R. 590.

(b) Cowp. 289.

(c) Cowp. 284.

(d) See 2 Williams on Executors, 1189.

(e) Peake’s N. P. C. 121.

(f) 7 B. &amp; Cr. 542.

decision, that no action can be maintained at law for a legacy. *Doe v. Gray* (a) was a case of specific legacy. *Gregory v. Harman* (b) will not affect this case, for there the executors were released, and the plaintiff assented to let his share remain in their hands. Besides, if the action can be maintained on an express promise to pay the legacy, the common counts are not sufficient for that purpose (c), and there is not evidence to support them. The first account rendered by the defendant did not import the legacy duty to have been paid by him, and the second was delivered to the plaintiff's brother in his absence. Nothing prevented the defendant from retaining the amount of legacy duty. In *Johnson v. Johnson* (d) Lord *Alvanley* said, "If an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a court of common law would not entertain an action for money had and received against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied." Here is no evidence of money had and received by the defendant to the plaintiff's use, nor can the words in the account "By cash retained for *Joseph Hart*," support the count on an account stated; for that does not acknowledge possession of a sum unconditionally set apart for the plaintiff's use. *Gorton v. Dyson* (e) and *Meert v. Moessart* (f) do not apply.

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*N. R. Clarke* and *Humfrey* supported the rule. First, the cases in *Cowper* are not overruled by *Deeks v. Strutt*, and establish that an action lies against an

(a) 3 East, 120.

(b) 1 M. & P. 209; Wms. on Executors, 1188.

(c) In both the cases in *Cowper*, there were special counts.

(d) 3 Bos. & P. 162.

(e) 3 Moore, 558; 1 Brod. & B. 219, S.C.

(f) 1 Moore & P. 8.

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executor on his express promise to pay a legacy money. *Davis v. Wright* (a) could not have been otherwise decided in favour of the plaintiff. The legatee sustained an action brought against an executor on his promise made in consideration of forbearance not to sue him for a legacy. The expressions in Lord Alton's judgment in *Deeks v. Strutt* are overstrained, when they are said to extend beyond the facts of that particular case. The language of the judges in *Doe v. Gray* tends to restrict the general stringency of *Deeks v. Strutt*; and Grose J., one of the judges in that case, said, "The only question there was, whether the executor would raise an implied *assumpsit* to pay the annuity on proof of the executor's acknowledgment of assets. If actions of this kind were permitted to be maintained, and the executor could show his promise to have been made under a mistake, an injunction would prevent injustice being done. *Jones v. Tanner* (c) turns on the executor having been no consideration for a promise to pay money by the defendant, who was sued as executor of B. Jones, for B. Jones had never made himself personally liable. The editors of *Saunders*, after reviewing the dictum of Lawrence J. in *Doe v. Gray*, cite *Atkins v. Hill* and *Hawkes v. Saunders* as authorities to show that an action will lie against an executor on an express promise to pay him, in consideration of assets, and *Gorton v. Dyson* (d) as proving that an action against executors for money had and received by the testator, in his lifetime, will lie upon an express admission by the executor that he had money in his hands for the payment of the legacy. He is the defendant admitted assets, and promised to pay the legacy. [*Bolland* B. mentioned *Bane's* case (e).] But the present action is completely borne out by *Gregory v. Harman* (f), where executors accounted with the plaintiff

(a) 1 Ventris, 120.

(b) 3 East, 120.

(c) 7 B. &amp; C. 54.

(d) 1 Br. &amp; B. 219, cited 2 Saund. 137, &amp; 1 Co. 94, cited 1 Ventris, 120.

(f) Williams on Executors, 1168; 1 Moore &amp; Payne, 212.



tiff and three others, who were residuary legatees, and having paid each the sum due to him, took from all of them, including the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow them to keep it in their hands; and it was held, that as they had not so retained it in their character as executors, the plaintiff might recover it at law. *Burrough* J. there said, "I was fully aware at the trial of the case of *Deeks v. Strutt*, but thought it had nothing to do with the present, as the defendant had rendered an account to the plaintiff at the expiration of a year from their testator's death, and had actually paid the three other legatees the sums due for their several proportions."

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Secondly, *Gorton v. Dyson* and *Gregory v. Harman* show that the money counts and account stated will support this action. The judgment in the latter case shows that the plaintiff did not recover on the special counts. As to the evidence in this case on the account stated, the form of the account is that of a final account, after which and after the defendant's expression that he had got the money ready to pay over, the defendant retained this money in his individual capacity.

*Cur. adv. vult.*

On the 29th April 1834 the opinions of the learned bar were delivered:—

VAUGHAN B.—This case was lately argued before my brothers *Bolland, Gurney, Williams* and myself. It is an action brought against the defendant for 185*l.* 10*s.* as money had and received by him to the use of the plaintiff, and on an account stated by him in his private capacity and not in his character of executor. The circumstances were shortly these:

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one *Ellaby*, by his will bequeathed the residue of estate to his executors as trustees, who, after satisfying his debts, were to divide the residue into six parts, of which the plaintiff was to have. The defendant was one of the executors and possessed himself of the assets. In *October* 1831 he summoned the plaintiff claiming the residue, and exhibited an account of the state of the property then, and charged himself with assets to the amount of 2375*l.* and upwards, having paid to several of the legatees a considerable portion of what was legally due, was about to pay the plaintiff, but the plaintiff, being called out of the room by some person who arrested him, was taken to prison. There was another meeting of the legatees in *March* 1832, when the defendant exhibited a regular account, and having charged himself with cash retained for three of the legatees, distributed the other shares. The defendant wrote on the account that he retained for the plaintiff 179*l.* 10*s.* The question was, whether under these circumstances this action could be maintained. The defence was, that it was an action for a legacy, and if maintainable at all, that it could not be supported against the defendant in his individual character; and *Deeks v. Strutt* (a) was relied on. The only question there was, whether, on the mere proof of assets in the executor's possession, the law would imply a promise by him to pay an annuity bequeathed by the testator. Lord *Kent* certainly laid down the proposition broadly, that the common law courts were not the forum for such questions, and that the only precedent was in the time of the commonwealth; and *Grose J.* called it a novel experiment. That judgment was in conformity with the case *Farish v. Wilson* (b). In both cases the legacies were bequeathed to the plaintiff's wife, and that raises a

(a) 5 T. R. 690.

(b) 10 W. R. 73.

argument that the parties there should have gone into equity to protect her interest. Afterwards came *Doe d. Lord Say and Seale v. Guy* (a). Mr. J. Grose was on the bench at the time of the decision of that case also, and that shows the nature of the point really decided in *Deeks v. Strutt*, for the court there pronounced that that case must be taken with reference to its own particular acts. They were not inclined to carry its authority to the full extent put by Lord Kenyon. The present case is widely distinguishable from the above, and must stand or fall on the common count on an account stated, for a certain sum admitted to be due and to be retained by the defendant for the plaintiff, by which the character of executor is shifted off. It resembles *Gregory v. Harman* (b), where Burrough J. gave a strong opinion at *nisi prius* in favour of the plaintiff, as did my Lord Chief Justice Best, on the argument in banc to the same effect. On the whole, we think the action is well maintainable, on the ground of a certain sum being received and retained to the plaintiff's use, thus constituting an appropriation of it to his use, at the close of the accounts, when nothing remained to be adjusted. If the assets turned out insufficient, and the account to have been stated under a mistake, the plaintiff would be liable to an action for contribution.

**BOLLAND B.**—I am of the same opinion. I think that it was a strong fact, that the defendant being sued in his personal capacity, had debited himself with the sum of 179*l.* 10*s.* to the plaintiff's use; and therefore this case does not trench on any of the cases which decide that a legacy can only be recovered in a court of equity. In this case, I am of opinion that the defendant had changed or relinquished his charac-

(a) 3 East, 120.

(b) 1 M. &amp; P. 100.

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ter as executor, and had become the holder of the amount for the plaintiff's use.

WILLIAMS B. concurred.

Rule absolute to enter a verdict for the plaintiff for 185*l.* 10*s.* (a).

(a) Gurney B. was at *nisi prius*.

The KING *against* BULLOCK and Others.

A recognizance was conditioned for payment of costs occasioned by the defendant's claim to a sloop which had been seized as forfeited to his majesty and the seizing officers, under a smuggling act 3 & 4 W. 4. c. 53, s. 2. Held, that the condition was broken by the non-payment to the seizing officers of the 'costs occasioned by the claim,' though not incurred personally by them.

**SCIRE FACIAS.** The declaration was on a recognizance of bail in 100*l.* The defendants ~~craved~~ <sup>craved</sup>oyer of the writ and recognizance, and of the condition, which after reciting that *E. D.*, *W. S.*, and *J. P.*, officers of his Majesty's Customs, had lately seized, as forfeited to the use of his Majesty and themselves, the smack or sloop *Bien Aime*, with her tackle, &c. the property whereof was claimed by *A. Schiers* and *A. Gosselin*, (two of the defendants,) who had entered their claim in the Court of Exchequer, was for payment of the costs which should be occasioned by such claim, in case the vessel should be adjudged forfeited. They then pleaded that the said *E. D.*, *W. S.*, and *J. P.* did not prosecute the said claim, and that no costs were incurred by or occasioned to them by reason of the said seizure. Replication, that after the making of the recognizance, and before the suing out the writ of *sci. fa.*, to wit, on &c., the said smack or sloop was duly adjudged forfeited, and that a large amount of costs was occasioned by the said claim, which was taxed by the remembrancer at the sum of 146*l.* 5*s.* 6*d.*, which sum had not been paid to the said *E. D.*, *W. S.*, and *J. P.*, or either of them, but was still in arrear

and unpaid. To this replication the defendants demurred, and the Attorney-General joined in demurrer.

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*J. Jervis* in support of the demurrer (*a*). The original enactment of stat. 8 Ann. c. 73. s. 63. shows that this recognizance extends only to secure to the seizing officers the payment of costs occasioned to them by the claim of the ship ~~the~~ defendants. The preamble demonstrates the intent of the legislature for preventing the great charges that the officers of the Customs seizing goods, prohibited and uncustomed, were put to by a groundless and vexatious claims entered thereto in the court where such goods are prosecuted. It would seem that the general costs of resisting the claim might be recovered by the Attorney-General, in a proceeding in the name of the seizing officers, *Rex v. Nunn* (*b*); but as it is here admitted that they have sustained no costs, the recognizance cannot be enforced.

*Barlow*, for the Attorney-General, was stopped.

*Per Curiam*.—(Lord ABINGER C. B., BOLLAND and ALDERSON Bs.) The recognizance here in suit is conditioned to pay to certain persons therein named, all the costs which should be occasioned by the claim. Then the replication, by alleging that costs were so occasioned, and not paid, shows a breach of the condition in the very terms of it. Whether the recognizance was entered into for the benefit of the seizing officers or not is quite immaterial, for the crown sues for the penalty, and the defendants do not show

(*a*) See 15 G. 2. c. 31. s. 7; 3 G. 3. c. 22. s. 8; 24 G. 3. c. 47. s. 37; and 6 G. 4. c. 108. s. 91. The enactment in force is 3 & 4 G. 4. c. 53. s. 101.

(*b*) Parker's Rep. 727.

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that the condition of the recognizance has been performed.

Judgment for the crown (a).

(a) See *Attorney-General v. Schiers*, 5 Tyr. 1029.

COLE against PERKY.

A rule nisi for security for costs will be granted, though the affidavit do not state in what stage the cause is, the motion being at the defendant's peril if too late.

COWLING moved for security for costs, on an affidavit which did not state the stage in which the cause was, and cited *Jones v. Jones* (b) as a decision in his favour.

ALDERSON B. (The only judge in court.)—You are entitled to the rule on that authority. I should have otherwise thought that you were called on to show in the first instance, that no objection existed to the motion.

(b) 2 Tyr. 216.

STUBBS against LAINSON and Another.

Case against a sheriff for a false return of *nulla bona*. The declaration alleged that the defendant seized and took in execution divers goods and chattels of the value of

CASE against the sheriffs of *London* for a false return. The declaration stated, that the plaintiff theretofore, to wit, on &c., in the court of our Lord the King of the Bench, at *Westminster*, before &c., by the consideration and judgment of the same court, recovered against one *George Allen* 16*l.* 11*s.*, which were adjudged to the plaintiff in and by the said court

monies directed by the *fi. fa.* to be levied; and then levied the same thereout. Plea, that the defendant did not seize or take in execution any goods or monies, and levy the monies so directed to be levied by the said writ in the declaration mentioned, or any part thereof, *modo et formá*. Held, that as the plaintiff, in order to support his action, need not prove more of his declaration than the seizure of the goods; the plea was bad for tendering too large an issue, by denying the matter alleged in the declaration, not in the disjunctive, but the conjunctive, which would make it necessary for the plaintiff to prove not only seizure of the goods, but levy of the money out of them.

for his damages by him sustained, as well on the occasion of the not performing certain promises &c., as for his costs, &c. The declaration then averred the delivery of the writ of *fi. fa.* to the sheriffs to be executed, and then alleged, that by virtue thereof the defendants, so being sheriffs of the said city of *London*, afterwards, to wit, on &c., and within their bailiwick as such sheriffs, seized and took in execution divers goods and chattels of the said *G. Allen* of great value, to wit, of the value of the monies so indorsed and directed to be levied as aforesaid, and then levied the same thereout. Yet the defendants had not the said monies, or any part thereof, before the said justices &c., according to the exigency of the writ &c.; and after the said levy, to wit, on &c., falsely and deceitfully returned that the said *G. Allen* had not any goods or chattels in their bailiwick whereof, &c.

The defendants pleaded that they did not, by virtue of the said writ in the said first count of the said declaration mentioned, seize or take in execution any goods or monies of the said *G. Allen*, and levy the monies so indorsed and directed to be levied by the said writ in the said declaration mentioned, or any part thereof, *modo et formâ*; concluding to the country.

Demurrer, assigning for causes that the traverse in the plea, that they the defendants did not, by virtue of the said writ, seize or take in execution any goods and chattels of the said *G. Allen*, and levy the monies so indorsed and directed to be levied, or any part thereof, is too large and extensive, and tends to raise an immaterial issue, and is insufficient in this, to wit, that such matter is denied in the conjunctive instead of being denied in the disjunctive; viz. that the defendants did not seize or take in execution any goods and chattels of the said *G. Allen*, or levy the monies so indorsed and directed to be levied, or any part there-

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of. And the defendants have thereby attempted to compel the plaintiff to adduce more extensive evidence than by law ought to be and would be required to support the said first count of the same, if the same were properly traversed; inasmuch as either the taking and seizing the goods of the said *G. Allen* by the defendants, or levying the monies so indorsed and directed to be levied, or any part thereof, would be sufficient to support the said action of the plaintiff.

Joinder in demurrer.

The points stated for argument on the part of the plaintiff were, that the second plea was bad, because it traversed an allegation in the conjunctive, which might have been supplied by proof in the disjunctive, the effect of the traverse being to impose on the plaintiff more extensive proof than is by law essential to the support of his case.

*Miller* in support of the demurrer. The plea tends to raise too large an issue; for not only does it call on the plaintiff to prove that the sheriffs seized the goods, but also that they levied the monies by the writ directed to be levied. The latter proof is not requisite to support the action for a false return, which lies if the sheriff seized only. In note (24) to *Goram v. Sweeting* (a) it is said, when an action is brought for damages, in which the plaintiff is by law entitled to recover in proportion to the loss or injury he has actually suffered, it seems to follow that a traverse which ties him up to prove the whole damage stated in his declaration before he can recover at all, is contrary to the principles of law which govern actions of this kind, and therefore cannot be supported." This position was cited in argument in *Moore v. Boulcott* (b), and acted on there. [Lord Abinger C. B. You contend that the plea contains

(a) 2 Saund. 207.

(b) 1 Bing. N. C. 324.



negative pregnant, for the defendants might have seized, and yet not proceeded to levy the money; and that if the general issue had been pleaded the plaintiff would not have been bound to prove the levy, or more than the seizure.]

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*James* supported the plea. In order to impugn the return of *nulla bona*, the plaintiff was bound to prove that the defendants levied, viz. converted the goods into money, as well as the mere seizure by them; for both facts are requisite to support the single proposition of their having executed the *fi. fa.(a)*. Now wherever the proof of several facts is necessary to establish one proposition, the opposite side may put the party advancing it on proving them all, *Robinson v. Raley (b)*, *O'Brien v. Saxon (c)*. He also cited the judgment of *Patteson J.* in *Wray v. Earl of Egremont (d)*.

LORD ABINGER C. B.—The sheriff may have seized and yet not have the goods in his hands. Here the plaintiff, in order to maintain his action, was not bound to prove more of his declaration than the seizure by the sheriff. Suppose the plaintiff to have rested his case there, the sheriff would have been obliged to discharge himself of his liability by showing why *nulla bona* was returned; *e. g.* that though he had seized he had not been able to levy the sum indorsed on the writ, on account of more rent being due to the landlord than the goods would produce, &c.; but that is not here pleaded. In *O'Brien v. Saxon (e)* the plain-

(a) See 3 Lev. 192.

(b) 1 Burr. 316.

(c) 2 B. & C. 908; and *Selby v. Burdons*, 3 Bar. & Ad. 19; 3 Tyr. 430, S. C. in error; also Stephen on Pleading, 274; 1 Chitty on Pleading, 4 ed. 524, 532, 562.

(d) 4 B. &amp; Adol. 122.

(e) 2 B. & C. 908; cited *per cur.* 3 Tyr. 440.

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tiff's trading and bankruptcy, and petitioning creditor's debt, were three facts essential to be proved by the defendant. The defendants may amend by inserting *or for and*. The plea will then be that the defendant did not seize *or* levy.

Judgment for the plaintiff, if the defendant did not avail himself of the leave to amend.

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LIGHTFOOT *against* KEANE.

Lands were devised to trustees upon trust to pay a part of the rents and profits to the devisor's widow, and the rest towards the maintenance and education of his son till he reached 21, and after that time to him during the lifetime of his widow; after her death the property was devised to the son in fee.

The trustees defended suits respecting the trusts of the will, and in so doing incurred a debt to their attorney for costs, and de-

posited the title-deeds with him as a security for it. Held, that after the death of the devisor's widow, the son might maintain detinue against the defendant for the deeds without their being subject to any lien for the personal liability which the trustees had incurred by employing him.

DETINUE for title-deeds. Plea, that one *John Lightfoot* was seised in fee of certain messuages, tenements, and premises, to which those title-deeds belonged; and being so seised, in the year 1824 by his will devised those estates, upon certain trusts in the said will particularly mentioned, unto *S. and K.*, who took upon themselves the execution of the will, and became and were seised of the estates upon the trusts in the said will contained, and by virtue thereof entitled to the possession of the title-deeds, and afterwards delivered them to and deposited and lodged them with the defendant, being the attorney and solicitor of the said *S. and K.*, for the affairs and businesses connected with and arising out of the trusts of the will, to be by the defendant used and referred to in the suits, affairs, and businesses in which the defendant was so employed as such attorney and solicitor, and for all other purposes connected with or arising out of the trusts of the will. That *S. and K.*, whilst the deeds continued in the possession of the defendant, became indebted

to the defendant in 120*l*. for work and labour in different causes and suits, and for certain fees due and of right payable in respect thereof; which sum of money still remains unpaid. Wherefore the defendant, having a lien upon the said deeds, detained them for his lien, as it was lawful for him to do. Replication, that the trusts in the will were, that the trustees should receive the rents and profits, and pay and apply two-thirds of them towards the maintenance and education of the plaintiff, until he attained the age of twenty-one years, and after he attained twenty-one to pay them to him, and the remaining third part to his widow for her life, and that after her decease the testator devised the estates to the plaintiff in fee. It then set out that the widow died on 30th *April* 1830, and that the plaintiff attained twenty-one on 24th *February* 1834, and requested the defendant to deliver up the deeds.

Special demurrer, assigning for causes that the plaintiff had not in any manner traversed or denied, or confessed and avoided the matters alleged in the plea; nor had the plaintiff denied that the defendant had such lien on the title-deeds as the defendant had alleged, neither had he in his replication shown that the lien of the defendant upon the deeds had been paid, satisfied, or otherwise discharged.

Joinder in demurrer.

*Channell* supported the demurrer. The plaintiff claims under the will, and must take the fee with the incumbrances on it; viz. the defendant's lien on the deeds. The trustees took the land on the trusts in the will as agents, for the benefit of the plaintiff, the person ultimately entitled to the estate; as such they incurred a debt to the defendant arising out of the trusts. That debt became a charge on the estate itself, and they were not liable for it. This is not like

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the case of a remainder-man taking not inconsistently with the title of a deceased tenant for life, who had deposited the deeds of the estate.

*Watson* for the plaintiff. It is not even averred that the debt accrued before the estate vested in the plaintiff. [He was stopped by the court.]

Lord ABINGER C. B.—Whatever powers the trustees had, this was a debt due from them personally to the solicitor whom they employed. Unless they could mortgage the land, which is not pretended, they could not make a deposit of the deeds, which would amount to an equitable mortgage. The defendant has no more ground to claim this lien than he would have had if, after knowingly dealing with a tenant for life, he had sought to retain the deeds as against the tenant in remainder.

*Per Curiam.*—(Lord ABINGER C. B., ROLLAND and GURNEY Bs.)

Judgment for the plaintiff.

DOE on the demise of PEMBERTON and Others *against*  
 EDWARDS.

Certain premises were demised to *M. E.* and her heirs, *habendum* to her and her heirs, for and during the natural lives of her son *J. E.*, her daughter *M. E.*, and her son *Alexander's* grand-daughter, and the life of the survivor of them. *Alexander* had no grand-daughter at the time of the execution of the lease, but had several subsequently. Held, that the lease determined on the death of the survivor of *J. E.* and *M. E.*

**EJECTMENT.** The parties had agreed to state the facts under a judge's order in the form of a special case, for the opinion of this court, pursuant to 3 & 4 Will. 4. c. 42. s. 25. The case stated was as follows.

*John Campbell*, at the time of making the indenture

of the facts under a judge's order in the form of a special case, for the opinion of this court, pursuant to 3 & 4 Will. 4. c. 42. s. 25. The case stated was as follows.

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of demise hereinafter mentioned, ~~was~~ seised in his demesne as of fee of the premises mentioned in the declaration in this ejectment, ~~then~~ in the occupation of *Mary Edwards*, the lessee hereinafter mentioned, or her under-tenants, as tenants to him. And being so seised, the said *John Campbell*, by an indenture bearing date the 29th of *September* 1779, and duly inrolled in the Court of Common Pleas in the following *Hilary* term, and made between him, the said *John Campbell*, of the one part, and *Mary Edwards*, of the other part, in consideration of certain yearly rent and covenants in the said indenture mentioned, demised the said premises therein described as in the occupation of her under-tenants to the said *Mary Edwards*, to have and to hold the same to the said *Mary Edwards* and her heirs, from the feast of *St. Michael* the Archangel then last past, “ for and during the natural lives of the said *Mary Edwards*’ son, *John Edwards*, her daughter *Martha Edwards*, and *Alexander Edwards*’ grand-daughter, and the life of the survivor of them.

The said *Alexander Edwards* was a son of the said *Mary Edwards*. He had no grand-daughter living at the time of making the said indenture, nor had he ever had any grand-daughter before the said indenture was made, but he had a daughter *Elizabeth*, his eldest child, and two other children, then living.

He did not have any grand-daughter until the year 1797, when *Martha*, a daughter of his said daughter *Elizabeth*, was born; and since that time and during the life-time of the said *John Edwards* and *Martha Edwards*, two of the said *cestui que vies* named in the said lease, the said *Alexander Edwards* had twelve other grand-daughters, all of whom, including the said *Martha*, the daughter of *Elizabeth*, are still living.

In the year 1807 the lessors of the plaintiff purchased the premises in question from the said *J. Camp-*

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bell, and the same were by him duly conveyed to the subject to the lease aforesaid.

*Martha Edwards*, one of the *cestui que vies* in the lease mentioned, died in *March* 1830; *John Edwards*, another of the *cestui que vies* in the said lease mentioned, died on the 10th *March* 1835; and the said *Elizabeth*, the daughter of *Alexander*, died some years previous to the said 1835.

The question for the opinion of the court was whether the estate created by the said indenture demise was or not determined upon the death of the said *John Edwards*.

The points stated in the margin were as follows:

The lessors of the plaintiff contend that the lease expired on the death of the said *John Edwards*.

The defendant contends that the lease was to endure for the life of *Alexander's* first daughter who should come into *esse* after the making of the lease, or of a grand-daughter living at the death of the two other *cestui que vies* named; and that consequently it did not determine on the death of *John Edwards*.

*E. Vaughan Williams* for the lessors of the plaintiff,—after suggesting that the deed was merely *habendum* to *Mary Edwards* and her heirs as mere words of special occupancy, and not a grant to her and her heirs by way of inheritance,—was stopped by the court.

*W. Rogers* for the defendant. *Mary Edwards* either took an estate *pur autre vie* intended to endure beyond the two lives of *John* and *Martha Edwards*; or if the latter words of limitation of estates for life are indefinite and void, the defendant may go back to the first words which are sufficient to create a fee in *Mary Edwards*. But the intention sufficiently appears, viz. that the

freehold lease should endure during the lives of *John* and *Martha Edwards*, as well as of any grand-daughter which *Alexander Edwards* might acquire at any time by his daughter *Elizabeth*. [Lord *Abinger* C. B. It is said that the grantor gave an estate not for a definite period only, but for a period beyond. But that does not follow, for had a grand-daughter of *Alexander Edwards* been in existence at the time of executing the deed, she might have died before *John* or *Martha Edwards*. How could the estate have then revived on the birth of an after-born grand-daughter?] Had that case arisen, the estate might have determined at the death of the survivor of the lives definitely pointed out.

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LORD ABINGER C. B.—The only doubt we entertain is, whether any estate passed at all; however, as we are bound to construe this lease most strongly against the grantor, we must hold that some estate did pass. But we are of opinion that we cannot insert in the limitation the name of a grand-daughter of *Alexander Edwards*, who was not in existence at the time the deed was executed. No authority has been discovered to the contrary. Our judgment must therefore be for the lessors of the plaintiff, on the ground that the estate granted was good for the lives of *John* and *Martha Edwards*, but not for that of the grand-daughter of *Alexander*, who was not in existence when the lease was executed.

BOLLAND and GURNEY Bs. concurred.

Judgment for the lessors of the plaintiff.

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HART *against* LEACH.

A landlord who does not personally make or interfere in a distress is not liable to an action for the neglect of the broker employed by him to make it, in not delivering to the party distrained on a copy of the charges of the distress, according to 57 G. 3. c. 93. s. 6., and a plea by a landlord sued for such neglect of his broker, that the distress was made by his direction as landlord of the demised tenements, and not personally by him, but by one E., his broker, in that behalf, and who, as such, made and conducted the distress for the defendant, and that the defendant did not otherwise make or interfere in it, and that the charges were the charges of the broker, was held good, as denying the defendant's interference at all in the distress from beginning to end.

**C**ASE for an irregular distress. The second count alleged, that the defendant seized and distrained other goods and chattels of the like description, as in the first count mentioned, as for and in the name of a distress for rent, to wit, 20*l.* due from the plaintiff to the defendant for certain tenements and premises. Averment, that the defendant thereby took an unreasonable distress for the said arrears of rent, and a small part, to wit, one-fourth thereof, then was sufficient value to have satisfied the distress and expenses of the same, and of the sale and appraisement thereof. Averment, that the defendant did not give to the plaintiff, or leave at the chief manor house, or most notorious place on the said premises notice of the said distress, or of the cause of taking; and the defendant *did not give a copy of the charges, and of all costs and charges of the said distress, or of any part thereof respectively, to the plaintiff, and the defendant therein respectively wholly made default, against the form of the statute in such case provided (a).*

The fourth count was for taking an unreasonable distress; for not giving notice of distress; for causing the goods to be appraised; for not selling the best price; and for not leaving the overplus in the hands of the sheriff, under-sheriff, or constable for the use of the plaintiff. And the plaintiff averred that the defendant *did not give a copy of his charges, and of all the costs and charges of this distress, or any part thereof, signed by him, to the plaintiff; and*

(a) 57 Geo. 3. c. 93. s. 6.



that the defendant in all the said several notices respectively thereinbefore in that count charged upon him, then wholly made default, against the form of the statute in such case provided.

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The defendant pleaded to each of these counts, so far as related to the defendant's not giving a copy of his charges, and all the costs and charges of the said distress, that the distress was made by the defendant's directions as landlord of the said tenement, and not personally by him, but by one *Thomas Edlin*, being a broker; and that the broker made and conducted such last-mentioned distress for the defendant, and that the defendant did not otherwise make or interfere in the distress, and the said charges and costs were the charges and costs of the said *Thomas Edlin*; concluding with a verification. Special demurrer, assigning for cause, that as the defendant, as landlord, caused the distress, he thereby made himself a party thereto, within the meaning of the statute 57 Geo. 3. c. 93. s. 6., and that as no bill of the costs and charges of the distress was given by the defendant, or by his broker, the defendant as landlord was liable for the default. Joinder in demurrer.

The points stated in the margin, on the part of the plaintiff, were the causes of demurrer specially stated, and that the plea did not deny that the defendant personally interfered in the distress, or that he made or interfered in the appraisement or sale personally or otherwise.

*Mansel* in support of the demurrer. By 57 Geo. 3. c. 93. s. 6. it is enacted, that "every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and

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chattels any distress shall be levied." That enactment is in *pari materiâ* with 2 W. & M. sess. 1. c. 5. s. 1., which enables the person distraining to cause the goods to be appraised, and after such appraisement to sell them for the best price that can be gotten towards satisfaction of the rent and of the charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hand of the sheriff, under-sheriff, or constable, for the owner's use. Landlords are as responsible for the broker's irregularity or neglect to comply with 57 Geo. 3. as they have been always held to be under the act of W. & Mary. The words "other person who shall make or levy any distress" in 57 G.3. must be referred to "the person distraining" in 2 W. & M., viz. the landlord. Besides, the plea only denies the landlord's interfering in the first stage of the distress, viz. the taking the goods, so that he may have afterwards interfered in the two remaining stages by appraising and selling them.

*Channell* contra. The declaration complains that the defendant did not give a copy of his charges and of the costs of the distress to the plaintiff. That is the particular complaint to which the plea is confined. [Lord Abinger C. B. If it is to be contended on the other side that wherever the word "distress" occurs in the declaration, it is to be taken to embrace all that is done in making the distress, why is it not to be similarly taken in the plea?] As to the other question, it is submitted to be clear, that by the true construction of the act 57 Geo. 3. it only applies to the person actually making and interfering in the distress.

LORD ABINGER C. B.—The defence on the plea is, that the defendant did not personally interfere in making the distress, but that it was made and conducted

by the broker, that is, from the beginning to the end of it. The question is, therefore, reduced to the construction of the act of 57 *Geo.* 3. c. 93. Now the second section empowers the justice to order the person who shall have levied any other or greater charges than those mentioned in the schedule to pay the penalty. That cannot mean to affect the landlord, unless he personally attends the making the distress, but only the broker who actually levies. Then the act itself makes a difference between the landlord and a broker as to the share taken by each in making and conducting a distress. It is true that no such remedy before magistrates is given, in case no copy of the charges of distress is given; but before this act passed, the party distrained on had no right to a copy of the charges. It appears to me, that the sixth section applies to the broker, or person actually distraining, and not to a landlord who does not personally interfere in the making and conducting the distress. The plea is therefore good.

PARKE B.—I am of opinion that the 6th section only applies to persons actually interfering in making the distress. It provides that “every broker or other person who shall make and levy any distress.” ‘Other person’ there means a party actually seizing and assisting in making and levying a distress. He is then to “give a copy of his charges:” what charges can be made in such a matter except by a person doing some manual work? I have no doubt on this construction of the statute. As to the plea, its meaning must be taken to be that the defendant, the landlord, did not interfere at all in the distress from beginning to end. The plea appears to me to be good as well on the general as the special demurrer. The expression “costs and charges of the distress” means not only the

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costs of distraining, but of remaining in possession, appraising, selling, and stamp.

BOLLAND and GURNEY Bs. concurred.


Judgment for the defendant.

PALMER *against* WALLER and Another, Executors of  
WALLER.

If an executor, who is sued as such for a debt of the testator, plead to the action, but does not plead *plene administravit*, and has judgment against him, that judgment is evidence of a *devastavit*; and if after a return of *nulla bona testatoris* by the sheriff of the county in which the action is laid, a writ of *scire fieri* inquiry issues to another sheriff, who returns *nulla bona testatoris*, notwithstanding the judgment is given in evidence on the inquiry without any evidence for the defendant, that the assets admitted on the pleadings to exist at the time of the judgment, have been legally administered since, the court will quash the return, and award a new *scire fieri* inquiry.

**A**SSUMPSIT against the defendants as executors on a promissory note made by the testator. Pleas: first, that the testator did not make the note; second, that the testator made it for accommodation and without receiving value for it; and lastly, that the testator had paid it. Issues were joined on these pleas, and the plaintiff obtained a verdict. Judgment was signed thereon, and a writ of *fi. fa.* issued to the sheriff of *Norfolk* to levy the amount of the verdict *de bonis testatoris si, et si non*, to levy the costs (50*l.*) *de bonis propriis*. The sheriff levied the costs and returned *nulla bona testatoris*. The plaintiff thereupon issued a writ of *scire fieri* inquiry to the sheriff of *Norwich* at the taking the inquisition, and put in the judgment to prove the existence of assets and the *devastavit*. The under-sheriff directed the jury that the plaintiff was bound to have proved that the defendants had in their hands effects of their testator. He afterwards returned *nulla bona*. On a former day *J. Jervis* moved, on an affidavit of the facts above stated, and on producing office copies of the judgment roll with the judgment

thereon of the *testatum fieri facias* issued in the cause, directed to the sheriff of *Norwich*, and of the return of *nulla bona* thereto, for a rule to show cause why the last-mentioned return should not be quashed and a new *scire fieri* inquiry awarded. He contended, that as the *scire fieri* suggests a *devastavit*, and includes a *fieri facias*, and the defendants, by pleading over, admitted the possession of assets, the jury should have found a *devastavit* of them between that time and the time of the inquiry; *Erving v. Peters* (a).

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ALDERSON B.—The event stated on the inquisition contradicts the record, which admits assets. The return may be quashed and a fresh inquiry had. That is the course.

*J. Jervis* moved to make it part of his rule, that the plaintiff might have the costs of the inquiry against the sheriff.

ALDERSON B.—Not without showing wilful misconduct on his part. Were you to take your rule in that shape there might be some danger of your being called on to pay the costs of it.

Rule granted without costs.

*Biggs Andrews* showed cause. The usual course in cases where an executor, who is a defendant, has omitted to plead *plene administravit*, and judgment is obtained against him, is to bring debt on the judgment, and suggest a *devastavit*. That was the course taken in *Erving v. Peters*, in which case too the sheriff had already returned a *devastavit* before the action on the judgment was brought. If the plaintiff is at liberty to take this course, and if, owing to the admissions on the pleadings, the judgment is evidence of assets existing

(a) 3 T. R. 685.

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at the time it was obtained, it does not prove that assets exist now, whether in the bailiwick of the sheriff of *Norwich* or elsewhere. They may have been legally administered since the judgment was obtained. [*Alderson* B. That might be matter of evidence; but the question here is, whether, as *plene administravit* has not been pleaded, the judgment was not *prima facie* evidence for the sheriff's jury, in the absence of all proof of the nature you allude to?] If on a *scire fieri* inquiry the judgment roll is to be sufficient proof of *devastavit* without more, that inquiry may well be dispensed with.

*J. Jervis* cited *Leonard v. Simpson* (a).

*Per Curiam* (b).—The judgment proves that the defendants had assets at the time it was obtained by the plaintiff, and they have not accounted for the subsequent disposition of them.

Rule absolute for quashing the return of the sheriff, and the inquisition to a writ of *scire fieri* directed to him in this cause, and for executing a new inquiry.

(a) 2 Bing. N. C. 176.

(b) *Bolland, Alderson, and Gurney* Bs.


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ELIZABETH ASHBEE, Administratrix of JOHN ASHBEE,  
 against PIDDUCK and Another.

Debt on a  
 joint money  
 bond for the  
 penal sum of

DEBT. The declaration stated that the defendants, together with one *Hannah Harrison*, since, and 2800*l.* against the two survivors of three obligors. Oyer of the condition for securing the repayment of 1400*l.* and interest. The plea then stated as to 800*l.*, parcel of the sum of 1400*l.* in the condition mentioned, that after the day named in the condition the defendant paid the plaintiff the sum of 800*l.*, parcel of the said sum of 1400*l.* Held bad on special demurrer, being only a plea of *solvit post diem* of part without any

before the commencement of the suit, deceased, to wit, on the 7th of *January* 1815, by their certain writing obligatory, sealed &c., acknowledged themselves to be held and firmly bound unto the deceased intestate, *J. Ashbee*, in 2800*l.* above demanded to be paid to the said *J. Ashbee*; yet neither did the said *Hannah Harrison* deceased, in her lifetime, nor did the said defendants, pay to the said *J. Ashbee* during his lifetime, nor have the said defendants since his decease, nor hath either of them at any time paid to the plaintiff, as administratrix as aforesaid, although often requested, the said 2800*l.* above demanded.

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The defendant *Pidduck* craved oyer of the bond, which was accordingly set out, and also of the condition, which was, that if *Hannah Harrison* and the defendants, their heirs, executors &c., should pay to the said *J. Ashbee* the full sum of 1400*l.*, together with interest &c., on the 7th of *July* next, the obligation should be void. He then pleaded as to the sum of 800*l.*, parcel of the said sum of 1400*l.* in the said condition mentioned, that after the 7th of *July*, in the said condition mentioned, and after the death of the said *H. Harrison*, and after the decease of the said *J. Ashbee*, and before the commencement of the suit, to wit, on &c. he the said defendant *Pidduck*, and the other defendant *Neame*, paid the plaintiff, as administratrix as aforesaid, the said sum of 800*l.* in the introductory part of this plea mentioned, and parcel of the said sum

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answer as to the residue, viz. 600*l.*, which was forfeited by non-payment at the day named in the condition.

Another plea stated that the two defendants were only sureties for the deceased obligors, and that plaintiff had given a release to the representative of the deceased. Held, that as it did not appear either from the bond or condition that the defendants were other than original debtors, the plea was, as against them, no answer to the action.

In debt on bond, no breach, by non-payment of the money, need be alleged, if the declaration show the debt to be due on the bond; for it then lies on the defendant to discharge himself by plea of payment &c.

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of 1400*l.* in the condition mentioned, together with interest then due on the whole of the said sum of 1400*l.*, in the condition mentioned. Verification. to the said 600*l.*, residue of the said sum of 1400*l.*, the condition mentioned, *Pidduck* pleaded that said defendant *Neame* made and joined in the said writing obligatory, at the request of the said *Harrison*, as the sureties only of her the said *H. Harrison*, to the said *J. Ashbee* in the said writing obligatory mentioned, and that after the making of the said writing obligatory of the said 7th *July* 1815, in the condition of the said writing obligatory mentioned, before the commencement of this suit, to wit, on the said *H. Harrison* duly made and published her last will and testament in writing, and thereby nominated and appointed *Robert Harrison* executor thereof, and that afterwards, to wit, on &c., the said *H. Harrison* died without having altered or revoked her said will and that afterwards, and after the death of the said *H. Harrison*, to wit, on &c., the said *Robert Harrison* duly proved the said last will of the said *H. Harrison* and took upon himself the burthen of the execution thereof. And this defendant *J. P.* further says, that afterwards, and after the death of the said *H. Harrison* and after the death of the said *J. Ashbee*, and whilst the plaintiff was such administratrix as aforesaid, and whilst the said *Robert Harrison* was such executor as aforesaid, to wit, on &c., 21st of *April* 1831, by a certain indenture, &c., setting out a deed of composition between the said *Robert Harrison* and his creditors, which he conveyed all his real estate, and also assigned and transferred all his debts and sums of money, goods, chattels and effects to certain trustees, of whom two defendants were two, upon trust to pay a dividend to such of the creditors who should agree to take their dividend in full satisfaction of their debts, and should



sign and seal the said deed, whereby they agree to release the said *Robert Harrison* from all further claim. The plea then alleged, that the plaintiff being one of the creditors of the said *R. Harrison*, in respect of the said 600*l.* in the introductory part of the plea mentioned, as such administratrix as aforesaid, did sign and seal the said indenture, in token of her agreement to partake of the said dividend, and that, except as aforesaid, the said *R. Harrison* was not, at the time of signing and sealing of the said indenture, indebted to the plaintiff in any further or other sum of money whatsoever. Verification.

The other defendant suffered judgment by default.

The plaintiff demurred to the first plea, and assigned the following causes; viz.—That the said first plea is wholly irrelevant, inasmuch as it is not pleaded to any part of the sum demanded in the declaration, but to a different sum, namely, parcel of the said sum of 1400*l.*, mentioned in the condition of the said writing obligatory; and also that a payment of a part only of the said sum of 1400*l.*, after the day mentioned in the condition, was no satisfaction or discharge of any part of the penal sum mentioned in the said writing obligatory and demand in the declaration; also that the plea doth not traverse or confess and avoid the cause of action in the declaration mentioned, or any part thereof; also that payment of part of the sum mentioned in the condition of the bond, after the forfeiture of the bond, cannot be pleaded in bar of this action, which is for the recovery of the penalty of the bond.

The plaintiff also demurred to the second plea, assigning the following causes; viz.—That the said plea is wholly irrelevant, inasmuch as it doth not appear that the said *Robert Harrison*, either as executor of the said *H. Harrison* or otherwise, was ever in any respect liable to pay to the said plaintiff, either as ad-

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ministratrix as aforesaid or otherwise, any part of said money, either in the said writing obligatory or the said condition thereof mentioned; nor how said supposed release in the said plea mentioned or is any discharge to the said defendant *I. Pidduck* and the said *T. Neame*, or either of them, of or from part of the said sum in the said declaration above-mentioned, nor that the plaintiff was one of the creditors of the said *R. Harrison* in respect of the said sum of 600*l.* as in the said last plea is alleged; also that the said *R. Harrison* being in law a stranger to the bond, a release to him could not operate as a release to the obligors of the bond, or any of them, nor could it be a satisfaction of the bond, or any part thereof, accruing from him; and also that the said plea doth not traverse or confess and avoid the cause of the action in the said declaration mentioned, or any part thereof; and also that the said plea is pleaded to parcel of the sum of 1400*l.*, in the condition of the said writing obligatory mentioned, and not to any part of the sum demanded in the declaration; whereas, inasmuch as the penalty of the sum mentioned in the bond became a debt at law by the forfeiture of the bond, and as the said penalty was in the sum demanded in the declaration, the last plea ought to have been pleaded to parcel of the penal sum and also, that the alleged release in the plea mentioned is therein stated to have been a release of 600*l.*, parcel of the said sum of 1400*l.* in the condition mentioned, but a release of parcel of the last-mentioned sum after the forfeiture of the bond, was no release of the sum demanded in the declaration, which is in the penalty of the sum mentioned in the said writing obligatory, or any part thereof.

Joinder in demurrer.

The court having stopped *Addison* in support of the demurrer, *Erle* was heard in support of the pleas. *T.*

first plea amounts to a plea of *solvit post diem*. [Lord Abinger C. B. How so at law? The penal sum is due as soon as the day mentioned in the condition has passed without payment of the smaller sum; but you plead *solvit post diem* as to part only of the 1400*l.*, named in the condition, viz. 800*l.*, without adding any plea of payment of the residue of the 1400*l.*] By stat. 4 *Ann.* c. 16. s. 12., where an action of debt is brought on any bond which hath a condition or defeazance to make void the sum on payment of a lesser sum at a day certain, if the obligors have, before the action brought, paid to the obligee the principal and interest due by the condition of such bond, though such payment was not made strictly according to the condition, yet it shall, nevertheless, be pleaded in bar of such action. Now had the obligor paid 800*l.* and 600*l.*, the plea would have answered the action, and there was no reason against pleading that a part, viz. 800*l.*, had been paid. The plea operates as if 600*l.* had been struck out of the condition. [Lord Abinger. The fact is not that 800*l.* was paid before the day named in the condition (a); then the only plea was *solvit post diem* under the stat. *Ann.*] As to the second plea, as *Hannah Harrison* was the principal debtor, the defendants, as mere sureties, might shelter themselves under the release given to her representative as a satisfaction of the 600*l.* the residue. This action is in fraud of the release given by the plaintiff to *R. Harrison* as to this debt, so that if, having released the principal, she recovers in this action against the sureties, she will recover twice, besides which the defendants may sue the insolvent *R. Harrison*, to recover the money released to him by the plaintiff.

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(a) As to pleading *solvit ante diem*, see 1 W. Bla. 210; 2 Burr. 944; 1 Lord Ken. 335; 2 Wils. 150.

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*Addison* for the plaintiff. This was a joint bond so that a release to the executor of the principal debtor cannot release the surviving obligors, for on the death of one of them it survived to the others. Nor could *R. Harrison* be sued as suggested.

Lord ABINGER C. B.—It does not appear from the bond or condition that the defendants were sureties other than original debtors. That being so, they are at liberty, as against the obligee, to give evidence, or show in pleading that they were sureties only. Had the fact been stated in the condition, there might have been ground for supporting a plea of equitable discharge, but it was too late to plead a release of the condition after breach of it, even if the statute allowed it, which it does not; for it only gives a defence by pleading payment after the day fixed in the condition. The bond was intended to prevent the obligee from suffering by default of any one of the obligors or their representatives.

*Erle* then contended that the declaration was bad on general demurrer, for want of averment that *Harrison* did not pay the plaintiff the 600*l.* at *Ashbee's* death. Consistently with the breach she might have done so.

*Addison* in support of the declaration. Assuming that the want of a sufficient breach in an action of debt is available on general demurrer, and not on special demurrer only, as in assumpsit, no breach at all was a requisite to be averred, for the declaration shows the money to be due *in præsentia* on the bond, and the defendants are bound to show it discharged in the nature of a defeazance.

Lord ABINGER C. B.—I agree that it was not nec-

sary to allege non-payment of the money secured by the bond by way of breach; for the condition, as set out on oyer, having become a part of the declaration, a debt from the defendants is acknowledged on the face of it, which it is for the defendants to show satisfaction of. I think Mr. *Addison* has established, that had the allegation contended for as essential been made, the plaintiff would not have been bound to prove it. That answers the defendant's objection.

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BOLLAND and GURNEY Bs. concurred.

Judgment for plaintiff.

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WATKINS *against* MAHON.

**A**SSUMPSIT on an attorney's bill. After giving credit for a payment of 232*l.* 10*s.* a balance of 225*l.* 9*s.* 2*d.* remained, and the defendant was arrested for 200*l.* After plea and notice of trial given, the defendant took out a summons to tax the plaintiff's bill, upon which *Patteson J.* made this order:—"Upon hearing the attornies or agents on both sides, and by consent, I do order that the plaintiff be at liberty to sign final judgment for the amount taxed, and the defendant undertaking to pay the amount and the costs of the action. On the taxation, the Master allowed the plaintiff 149*l.*, having disallowed 60*l.* expended by him in paying extra charges for copying &c. briefs in a very short period, by the defendant's direction. Held, first, that the plaintiff had probable cause for the arrest; and, secondly, that the defendant was estopped by the terms of the order from complaining of the arrest, except before the judge or master.

The defendant being arrested for the sum of 200*l.* due on an attorney's bill, applied to a judge to have it taxed, which was ordered, on consent of parties and on the terms

A party is not entitled to the costs of the taxation of his attorney's bill, though one-sixth is taken off, if the taxation is not applied for till after an action brought on the bill.

Whether there must be a recovery by verdict, in order to give a defendant a right to costs under 43 *Geo.* 3. c. 46., and whether a court has a right to tax an attorney's bill, except under the statute 2 *Geo.* 2. c. 23., *quære*.

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judgment immediately, and that the plaintiff's bill costs, on account whereof this action is brought, be referred to the Master to be taxed; that the plaintiff give credit on such taxation for all sums of money received by him from and on account of the said defendant, and that upon payment of what, if any, may on such taxation appear to be due, together with the costs of this action, to be also taxed and paid, no further proceedings herein shall be staid; and by further order, that in default of payment, the plaintiff be at liberty to issue execution in four days after the master's allocatur, for the amount specified in the allocation." The bills were taxed accordingly, 106*l.* 10*s.* 8*d.* deducted from them; thereby, with credits, reducing the plaintiff's balance to 149*l.* 0*s.* The master allowed the plaintiff the costs of the action.

*Maule* obtained a rule to show cause why so much of the order as respected the costs of the action should not be discharged; and why the plaintiff's costs of taxation of his bills of costs allowed him, as costs of the cause, should not be disallowed, and why the defendant should not be allowed his costs of the taxation and of the action.

*J. Jervis* showed cause. [*Parke* B. The rule of an attorney, from whose bill one-sixth is taken on taxation, must pay costs of taxation under 2 *Geo.* c. 23. s. 23., does not apply here, for that enactment only operates where taxation is applied for by action brought (a). This rule was granted on the authority of *Robinson v. Elsam* (b).] The order was made.

(a) *Benton v. Bullard*, 4 Bing. 561; *Joy v. Coaks*, 8 B. & Cr. 755; *Harbin v. Miles*, 9 B. & Cr. 755.

(b) 5 B. & Ald. 661.

by consent that the defendant should pay the costs of the action, and cannot be altered. It was just that he should pay them, for within a month after the delivery of the bill he might have had the bill taxed, without driving the plaintiff to bring this action. Nor does 43 Geo. 3. c. 46. s. 3. apply to give the defendant his costs, the arrest having been for a larger sum than that recovered, unless there was a recovery, *Rowe v. Rhodes* (a); that is, by verdict and judgment, *Holder v. Raitt* (b), *Keene v. Deeble* (c); *Robinson v. Elsam* is much shaken by *Rowe v. Rhodes* as to the above point, while *Dagley v. Kentish* (d) is contrary to Lord *Tenterden's* dictum, that the courts have general jurisdiction to refer to taxation the bills of costs of its attornies, independently of the statute (e).

But the plaintiff's affidavit discloses abundant facts to show reasonable cause for arresting the defendant for the full sum. [*Maule*, for the defendant, here objected to the use of the affidavit of the plaintiff, on account of its containing communications made to him by his client the defendant. [*Alderson* B. This dispute being between an attorney and client, and the question before us being whether the attorney had probable cause for arresting him for 200*l.*, the attorney's affidavit cannot be entirely excluded on the ground alluded to, or the client would have the case all his own way.

(a) 4 Tyr. 216.

(b) 2 Ad. &amp; El. 445.

(c) 3 B. &amp; Cr. 491.

(d) 2 B. &amp; Adol. 411.

(e) *Watson v. Postan*, 2 Tyr. 406. 2 C. & J. 370, S. C. agrees with Lord *Tenterden's* opinion, and was not cited in *Clutterbuck v. Combes*, 5 B. & Ad. 400; or in *Ex parte Bowles's Trustees*, 1 Bing. N.C. 632; or in *Weymouth v. Knipe*, 3 Bing. N.C. 387. The cases of *Clutterbuck v. Combes* and *Weymouth v. Knipe* seem to have been finally decided on other grounds; and see the authorities cited in 2 Tyr. 408, n. As to *Dagley v. Kentish*, *Bayley* B. said, that the point there established was, that the courts, under their general inherent power over attornies, will not refer to taxation a bill which has not a taxable item, *James v. Child*, 2 Tyr. R. 735.

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*Parke* B. Read such parts only of the affidavit as apply to the charge of arresting the defendant without reasonable or probable cause.] About 60*l.*, out of the 106*l.* 16*s.* 8*d.* struck off, was incurred in preparing and copying extra briefs by the defendant's direction in a very short period; for which copying extra charges were made by the law stationers. It was supposed that the master would allow this item.

*Maule* in support of the rule. The merits have been heard by the master, who has decided that the defendant is only liable to pay a sum less than that for which he was arrested. The statute 43 *Geo.* 3. c. 46. does not provide that the recovery must be by verdict and judgment. Then the debt is "recovered," when the proceedings in the action are brought to an end, and the money is paid under the order of the master, as the tribunal erected by the parties. *Robinson v. Elsam* (a) is expressly in point, that the act 43 *Geo.* 3. applies (b). Besides, though in *Dagley v. Kentish* the court entertained so much doubt on their general jurisdiction over attornies, that they refused, after action brought, to refer an attorney's bill for taxation, it having no taxable item (c); it has been since held, in *Watson v Postan* (d), that an attorney's bill can be ordered to be taxed upon the common law jurisdiction of the court. Such a question was fit for the taxing officers, viz. whether 3*s.* 4*d.* a sheet for drawing &c. briefs could be allowed as between attorney and client. The master's order ought to be conclusive. [*Alderson* B. Like a verdict it is conclusive as to the cause (e), but a verdict does not preclude a defendant from showing that the plaintiff had not probable cause for

(a) 5 B. & Ald. 661. (b) But see *Brooks v. Rigby*, 2 Ad. & El. 21.

(c) See p. 1025, n.

(d) 2 Tyr. 406.

(e) See *Eardley v. Steer*, 5 Tyr. 1071.



arresting him.] In *Robinson v. Elsam* the master had power to determine whether there was probable cause. (He did not urge any other parts of the rule.)

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**LORD ABINGER C. B.**—There is no ground for sustaining this rule on the merits, so that we are not called on to decide the points of law which have been argued. Now, the merits must be taken from the affidavits; they show that the plaintiff actually disbursed money on behalf of his client, which has been disallowed him by the taxing officer. The plaintiff may have been mistaken as to the prudence of that expenditure, but he cannot say that the plaintiff had not probable cause to think that the money actually expended at his client's request would be restored him by his client. The sum thus disallowed makes up the difference between the sum found to be due and that for which the arrest took place.

**PARKE B.**—I agree in opinion that the plaintiff had reasonable and probable cause for arresting the defendant for 200*l.*; and had I entertained a different one, I should hesitate to disturb the order made by consent of parties. The reference was by consent, upon condition that the plaintiff should sign judgment, and the defendant pay the costs of the action. If the defendant felt aggrieved by the arrest, he ought to have taken his stand before the master, and stipulated to have liberty to apply for this rule, supposing the court has jurisdiction over the case, under the statute or at common law.

**ALDERSON B.**—I agree with my brother *Parke*, that in order to raise the question the defendant should have stipulated before the judge, that it should be open to him to move for his costs in respect of being arrested for a larger sum than was recovered. The judge would

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then have exercised a discretion whether he would consent to have the costs taxed on such terms.

Rule discharged, without costs of such parts of the affidavits as did not refer to the probable cause for arresting the defendant.

DOE, on the demise of the Marquis of HERTFORD  
against HUNT.

A tenant of a farm gave a notice to quit, which by agreement of parties was to stand for *Michaelmas* 1835. Some months before that period he offered to go on at a reduced rent. The landlord's agent wrote him a letter, stating that the lessor could only consent to his offer of the diminished rent for the year from *Michaelmas* 1835 to *Michaelmas* 1836, "provided he, the lessor, could not

**T**HIS was an ejectment, tried before *Gaselee J.* at the last *Suffolk* assizes. The defendant had rented a farm of the marquis at 575*l.* a year till 1831, when it was reduced to 520*l.* In 1834 the defendant applied for a reduction of the rent to 400*l.*, and on being refused, gave, within proper time, a notice to quit at *Michaelmas* 1834. After this notice, the parties agreed that it should stand as a notice to quit at *Michaelmas* 1835, and that the defendant should hold on till that day at a reduced rent. Before *Michaelmas* 1835, the defendant offered to Mr. *Wickens*, the agent of the marquis, to keep on as tenant at 420*l.* He received this answer from the agent:—

"The Marquis of *Hertford* has directed me to inform you, that he could only consent to accept your offer of 420*l.* for the farm for the year from *Michaelmas* next to *Michaelmas* 1836, subject to the existing covenants, provided I could not find a tenant for it at the rent it appeared to the agent to be worth by the 1st of *August*." Before that day one *C.* applied respecting the farm, and desired to see it, but was refused permission by the tenant to enter and view it, and made no offer of any rent for it. The tenant held over beyond *Michaelmas* 1835, and the landlord brought ejectment:—Held, that the action will lay, it being an implied condition that the tenant should suffer applicants to go over and view the farm, upon breach of which the parties were remitted to their original rights, and the defendant had no right to remain on the farm after *Michaelmas* 1835.

rent it appeared to be worth by 1st *August*, and subject as well to the express understanding that the notice you had given to quit your farm at *Michaelmas* next, should be admitted by you not to be withdrawn, but to be turned over to *Michaelmas* 1836. The marquis also directed me to advertise your farm to be let in the *Ipswich* paper, and I shall send the advertisement for insertion in the next paper." An advertisement was inserted in the *Ipswich* paper as to be let at *Michaelmas* next (viz. 1835). On the 9th of *July* in that year the defendant signed the following memorandum:—"Mr. *Hunt* has explained that his offer for the farm was 400*l.* only, and, subject to this correction, assents to the terms proposed in Mr. *W*'s. letter." One *Catlin*, a neighbour of the defendant, who knew the farm, applied for it, but being refused leave to see it by the defendant made no further offer. The defendant was requested to quit at *Michaelmas* 1835, but refused, and this action was brought to recover possession of the farm. At the trial the defendant relied on the agent's letter as a proof that the tenancy continued till *Michaelmas* 1836. The lessor of the plaintiff had a verdict, subject to leave reserved to the defendant to enter a nonsuit on the above points.

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*Storks* Serjt. obtained a rule accordingly in last term, against which,

*Kelly* and *Gurney* showed cause in this term. Taking into consideration the whole agreement between the parties, it must necessarily be implied that one of its terms was, that the defendant should permit any person who wished to take the farm to see it, or the landlord could not expect to let it by the 1st of *August* 1835, as contemplated by the agreement. As the defendant refused to let *Catlin* see the farm, he relin-

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quished that part of the agreement that he should hold till *Michaelmas* 1836, if not let by 1st *August* 1835. The latter part of the agent's letter, as to the advertisement, supports this view of the case. [*Alderson* B. Is it an agreement at all? Is it not rather a conditional proposal by the marquis to let to the defendant after the 1st of *August* 1835, if he could not let it to another tenant in the meantime?]

*Storks* Serjt. and *Biggs Andrews* supported the rule. As the agreement contained no specific permission by the defendant that any one should go over and inspect his farm, the defendant had a right to prevent *Catlin* from seeing it, and no clause of entry will be implied, *Watson v. Waltham* (a). Besides, the lessor of the plaintiff was bound to show that he might have had a substantial advance above the rent of 400*l.*, which the tenant in possession offered to give. If the defendant was bound at common law to let *Catlin* go over the farm, the lessor of the plaintiff could sue him for damages in not suffering him to do so. If he was not so bound, a clause to that effect should have been introduced into the agreement, as indispensable to the object of letting the farm.

LORD ABINGER C. B.—This rule must be discharged. The agreement is not a formal one, and appears to me to be merely an intimation by an agent of the intentions of his principal, the landlord, which amount to this:—“ I cannot accept you as tenant, for a permanency, at 400*l.* per annum, but am not unwilling that you should stay a year longer, upon this condition, that I shall have till the 1st of *August* to let it to another tenant at a larger rent.” The agreement merely intimates the

(a) 2 Ad. & El. 485; 4 N. & M. 537, S. C.

state of the landlord's mind as to what he might be willing to do, if no better offer occurred before 1st of *August*. The letter looks, in form, like a substantive agreement to make fresh terms with the defendant respecting a tenancy when the 1st of *August* arrives, but it is no agreement till consented to by *Hunt*, who might say that he would quit at *Michaelmas* 1835. But if the agreement be positive for the defendant to continue tenant till *Michaelmas* 1836, it is, at all events, subject to the condition that the landlord should get another tenant before the 1st of *August*, so that if the defendant prevented his landlord from acting on, or effectuating that condition by the usual means, he cannot avail himself of its consequent non-performance to retain the land on his own terms. The agreement implies that the landlord is to have a right to take the usual means of getting a tenant. The defendant gives no notice of his intention to prevent him from so taking those means till it is discovered before the 1st of *August* 1835, from his refusal to let *Catlin* view the farm. That was in fraud of the landlord. Suppose the landlord had said, "I will let you the farm for another year, provided my surveyor reports it to be in good condition," and that he had signed an agreement to that effect; and further, suppose the surveyor had been prevented by the tenant from seeing the farm, could it be contended that the surveyor was to make his report without being allowed to see the farm? Surely it must be an implied condition in this parol contract, that the usual method of making a survey should be taken; and the contract must be at an end if the party prevents the performance of that condition, for no person desirous to take the farm could be expected to make an offer for it without seeing it. The defendant was bound, by the implied condition of the agreement, to suffer *Catlin* to see the farm, and having refused be-

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fore 1st *August* 1835 to do so, the condition is broken, and the agreement by which his possession might possibly have been continued for a longer period than *Michaelmas* 1835 was at an end.

BOLLAND B.—It was clearly a condition precedent to the completion of the contract between these parties, that the defendant should let any person sent by his landlord have the opportunity of seeing the farm before he made any offer for it. There was a large difference between the 400*l.* which was offered, and the 520*l.* which had been paid ; and how could the landlord, or his agent, ascertain what the farm was really worth, unless permitted to go over and view it ? It is no answer that *Catlin*, who occupied land near, must have known the nature of the farm, if, as appears the case, he did in fact desire to look over it, and was prevented.

ALDERSON B.—It appears to me that if there was any agreement at all, its nature was not such as to waive the operation of the notice to quit at *Michaelmas* 1835, which the defendant had previously given. While that notice is in full operation, the defendant comes to the landlord's agent, and says, I will not waive my notice unless the marquis will let me hold at the reduced rent of 400*l.* a year. In answer to this the marquis absolutely refuses to let the defendant go on as permanent tenant from year to year, at such a rent, but says he will try till the 1st of *August* next to let the farm at such a rent as it appears to his agent to be worth. If I do not let it before then, I will let you live on it another year at that rent. In the interval, before the 1st of August, the defendant prevents *Catlin* from seeing the farm, in order to make an offer for it to the marquis. That was in effect to hinder the marquis from doing what was necessary to let it at all,

and remitted the parties to their original rights. The defendant ought, therefore, to have gone out of possession at *Michaelmas* 1835, when his notice expired.

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Rule discharged.

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BROWN *against* Sir R. JARVIS, Knight, Sheriff of  
*Hampshire.*

CASE against the sheriff of *Hampshire* for negligence. The declaration stated that *Benjamin Batten*, on &c., was indebted to the plaintiff in a large sum of money exceeding 20*l.*, to wit, 86*l.* 8*s.* 4*d.*, upon &c., in respect of certain causes of action before then accrued to the plaintiff against *B. Batten*, and the said *B. Batten*, being so indebted, the said plaintiff, for the recovery of the said debt, heretofore, to wit, on &c. sued and prosecuted out of the court of our lord the now king &c. against *B. Batten*, a certain writ called a *capias*, directed to the sheriff of the county of *Hants*, (setting out the writ at length;) it was then alleged that the writ was duly marked and indorsed for bail for 86*l.* 8*s.* 4*d.*; and that the said writ so indorsed was afterwards, and within four calendar months from the date thereof, including the day of such date, delivered to the said defendant, who then was, and from thence until and at and after the expiration of the said four calendar months was sheriff of the said county of *Hants*, to be executed; that the said *B. Batten*, at the time of the delivery of the said writ to the said defendant, and from thence for a long time, to wit, until a certain other day, to wit, the 9th *October* 1834, was within the said sheriff's bailiwick, and the said pleading the general issue, but no evidence was given to support the court reduced a verdict for 40*l.* to 40*s.*

Since the Uniformity of Process Act, 2 W. 4. c. 39. a sheriff is bound to execute the writ of *capias* by arresting the defendant as soon after that writ is delivered to him as he can find opportunity, and cannot postpone the execution of it at all events till four months have elapsed.

But, *semble*, that he is not liable to an action for negligence in not arresting when he had an opportunity to do so, without proof of actual damage. Where such damage was admitted on the pleadings, for want of admission, the

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sheriff during that period, and more than eight days before the death of the said *B. Batten*, thereafter mentioned, might and could have taken and arrested the said *B. Batten*, by virtue of the said writ at the suit of the said plaintiff, if he would so have done, whereof the said defendant, so being such sheriff during all the time aforesaid, had notice, and was during all that time, and more than eight days before the death of the said *B. Batten*, to wit, on &c. requested by the said plaintiff so to do; yet the said defendant, so being such sheriff as aforesaid, not regarding the duty of his office, but contriving, &c. did not nor would at any time before the 9th day of *October* 1834, or within a reasonable time for that purpose after the delivery of the said writ to him the said defendant to be executed as aforesaid, although a reasonable time for that purpose elapsed between the delivery of the said writ and the commencement of the period of eight days before the death of the said *B. Batten*, as thereafter mentioned, take, or cause to be taken, the said *Benjamin Batten*, as by the said writ he was commanded, but therein wholly failed and made default. And the said *B. Batten* afterwards, to wit, on &c., being at large in the said bailiwick, to wit, on the 4th *October* 1834, met with an accident, which he could not have met with if he had then been in the custody of the said sheriff, and by reason and in consequence of the said accident the said *B. Batten* afterwards, to wit, on the 9th day of *October* 1834, died; whereby and by means and in consequence of the premises the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended in and about his said suit so commenced and prosecuted



against the said *B. Batten* as aforesaid, amounting to a large sum of money, to wit, the sum of 10*l.*

The defendant pleaded, first, that the said *B. Batten* was not indebted to the plaintiff in a sum of money exceeding 20*l. modo et forma*: secondly, that he the said defendant, from the time of the delivery to him of the said writ and until the time of the death of the said *B. Batten*, did use all the diligence in his power to take the said *B. Batten*, as by the said writ he was commanded. The replication traversed this allegation. At the trial before *Littledale J.* at the last *Hampshire* assizes, the following appeared to be the facts of the case. *Mason* being in debt to the plaintiff gave him a joint and several promissory note for the amount, having procured *Batten's* signature to it as a surety; *Mason* afterwards conveyed to the plaintiff, by way of mortgage, all his interest and equity of redemption in certain real property, as a collateral security for the same debt, covenanting to pay the debt within a month, or the conveyance to be absolute. The debt not being paid at the period fixed, the mortgaged property was sold, and after paying off a prior mortgage, 100*l.* remained to be applied in part satisfaction of *Mason's* debt. The conveyance to the purchaser recited the second mortgage, and then proceeded thus:—  
“ And for the consideration aforesaid and of the sum of 100*l.* to *Brown* (plaintiff) paid by the vendee, the receipt whereof, and that the same is in full payment and satisfaction of all principal, interest, and other monies due upon or in respect of the said recited mortgage, the said plaintiff doth hereby acknowledge, and of and from the same doth fully and absolutely acquit, release, and for ever discharge the said vendee, and the said *G. Mason*, and the said mortgaged premises.”  
The plaintiff, who still held the note, then sued *Batten* on it, for the amount due, after deducting the 100*l.*,

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and on 30th *July* the writ of *capias* was delivered to the sheriff of *Hants*. *Batten* at this time occupied a large and well-stocked farm, and continued to do so, and to attend to his business there till the 9th *October*, when he was thrown from a horse and died. The sheriff might have arrested him during all the latter mentioned period.

At the trial it was argued that the whole debt was extinguished by the covenant in the mortgage deed. The learned judge over-ruled the objection. It was urged that the action would not lie, as the four months at the end of which the *capias* was returnable had expired on the 9th *October*, nor was it shown to have been returned, or that the defendant had been required to return it. The learned judge held it unnecessary to wait till the return of the writ, and said, that though the plaintiff was entitled to a verdict for some damages, they ought to be nominal. The jury notwithstanding gave a verdict for the plaintiff for 40*l*. In last term

*Dampier* moved for a nonsuit, or to arrest the judgment, or in reduction of damages. The first ground for a nonsuit is, that *Batten* being a surety, was discharged by the giving time as well as a release to *Mason*, principal, in the conveyance to the vendee: then the sheriff is entitled to the same defence. For, though *Batten* was liable in respect of the joint and several note to which he was party, there was but one debt, viz. from *Mason* to the plaintiff. That debt secured by the note and mortgage was paid by the sale, and the same debt which was released by the conveyance to the purchaser. [*Parke* B. The covenant in the second mortgage is to pay in a month. What prevented the mortgagee from enforcing the note in the meantime against both parties, the mortgage being only taken as a collateral security?] *Dampier* c

*Allies and Others v. Probyn* (a). Lord Abinger C. B. The mortgage debt and the estate are released, but not the debt secured by the note to which *Batten* was party; there is no covenant not to sue on that note.] The other ground for a nonsuit, or in arrest of judgment, is, that neither on the declaration or the evidence did there appear any ground of action, the *capias* not having been alleged to be returned, or having been so in fact; and as the abatement of the action by *Batten's* death appears on the declaration, the question is open on the record.

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The COURT granted a rule to show cause, in the alternative, why a nonsuit should not be entered, or judgment arrested; also, why the damages should not be reduced.

*Erle* and *Crowder* showed cause in this term. The first question is, whether the plaintiff had any cause of action against the sheriff? It was admitted that if the sheriff had used due diligence he might have arrested *Batten* long before his death. It becomes important to settle at what time a sheriff is bound to arrest on mesne process, since the uniformity of process act, 2 Will. 4. c. 39. If he may keep a *capias* in his pocket for four months, much inconvenience will arise, and proceedings will be delayed, contrary to the intention of that act. [*Alderson* B. If the sheriff has no option as to returning the writ, and speedy return is required, why not apply to a judge for his order to do so, under sec. 15? There is a remedy against the sheriff by attachment for intermediate damages sustained (b). The plaintiff will often be ignorant whether the sheriff has executed the process or not, and the judge might per-

(a) 5 Tyr. 1079.

(b) See *Rez v. Sheriff of Essex*, in *Fitch v. Courtenay*, ante, 629.

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haps require it to be shown that the writ was executed before the application made to him. But if such an order would be granted of course, it must then accompany every writ that issues, unless the plaintiff chooses to lay by for four months. [Lord Abinger C. B. Suppose the plaintiff to have shown *Batten* to the sheriff on the 1st of *August*, and to have called on him to take him, might not the sheriff answer "No, I will have him at the return of the writ, and would it not suffice if he so had him?"] Undoubtedly so before 2 *W. 4. c. 39.*, but there is now no fixed time, during the four months for which the writ runs, within which the sheriff is bound to arrest the party or return the writ. Then the true construction of the act must be that he is bound to execute writs delivered to him, in a reasonable time, using due diligence for that purpose. But secondly, the plaintiff has sustained a damage which gives him a right to sustain his verdict at all events for some damages. The sheriff's public duty has been just stated, and if he neglects it by not arresting the defendant as soon as he can, a right of action vests against him for such negligence, and the law will presume some damage; *Barker v. Green* (a). The cases of neglect to execute final process are similar in principle; thus *Bales v. Wingfield* (b), *Aireton v. Davis* (c), *Jacobs v. Humphrey* (d), show, that if a sheriff does not sell goods seized under a *fi. fa.* within a reasonable period, he is at all events liable to pay nominal damages if no actual injury be proved. [*Alderson* B. In those cases there was damage in point of fact in the delay to receive the money the produce of the goods seized. The final process must be executed immediately.] *Marzetti v. Williams* (e), illustrates the right

(a) 2 Bing. 317.

(d) 4 Tyr. 272.

(b) 2 Nev. &amp; M. 831.

(e) 1 B. &amp; Adol. 415.

(c) 9 Bing. 740.

to recover nominal damages in respect of breach of duty. [*Alderson* B. The breach of duty there involved an actual damage, viz. the non-payment of the sum drawn for on the check. Lord *Abinger* C. B. *Lewis v. Morland* (a) shows that it is not every neglect of duty by a sheriff that vests a right of action against him at all events.] That was a case on the old process, where the sheriff had the defendant at the return of the writ, according to its exigency. [Lord *Abinger* C. B. The only assignable way in which this plaintiff could have been damaged was that he might have filed his declaration sooner had *Batten* been arrested, but a verdict and judgment could not have been obtained at an earlier period, and his death in the interval would have occasioned loss to the plaintiff instead of benefit. Suppose a writ to issue to-day, which the sheriff might execute to-morrow, but does not, will an action lie against him if the party should die the next day? The question is, what actual damage appears in this case? (b) [*Alderson* B. Unless the delay in the suit by the defendant's not being arrested before, be of necessity a damage to the plaintiff, there is no ground for this action. The subsequent death of the defendant has made it a matter of speculation whether the writ, if served, would have been effective or not; but we cannot entertain questions of speculative damages.

It being here recollected by the Court that the general issue was not pleaded, they dismissed the question in reduction of damages, whether or not legal damage existed, and desired the argument to be confined to the point in arrest of judgment.

*Dampier* and *G. H. White* supported the rule. No-

(a) 2 B. & Ald. 56.

(b) See *per Parks, J.* in *Benton v. Sutton*, 1 B. & P. 28.

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thing in the declaration shows that any return made, or return-day past, before the action was brought. The return of the sheriff indorsed on the writ is which the court can take notice. Before 2 Will. 39. the return was mentioned in all the forms of pleading, in order to inculcate the sheriff, *Barker v. Gre* *Stovin v. Perring* (b), *Moreland v. Leigh* (c). Now in 2 Will. 4. c. 39. affects the law of pleading, of kind of duties to be performed by the sheriff; no return need be made till four months have expired, unless a judge's order is obtained for an earlier return, which effect fixes a particular return-day. The defendant's death within the four months is at the plaintiff's risk if he has not obtained such an order. Till the return is made the court cannot know whether the sheriff has done his duty or not. He may have arrested the defendant and taken a bail-bond, or got the defendant's deposit; yet by doing so the bail may have been discharged, or the money returned. It may be that since process is returnable on execution and not on a particular day, unless so ordered by a judge, a sheriff is now bound to execute it within a reasonable time; but the plaintiff can only found a complaint of the contrary, by showing that a return has been made, or that the return-day is past. [*Alderson*]. That would go the length of showing that if the plaintiff suffers actual damage by the sheriff's delay, there is no right of action. It must be taken now on this rule that the defendant did sustain such actual damage. Formerly the sheriff's duty was to have the body on the return-day which appeared on the writ, whereas it is now to execute and return the writ as soon as he can after the old writ a return-day appeared.] A judge's order may now fix a return-day, and the sheriff is not bound to return the writ till he has executed it, or till the re-

(a) 2 Bing. 317.

(b) 2 B. &amp; P. 561.

(c) 1 Stark. C. N. P. 388.

day is fixed by a judge's order (a). [*Alderson B.* Can a sheriff be allowed to delay the return for four months by neglecting his duty? *Gurney B.* A sheriff ought to do his duty with due diligence without requiring a judge's order to do so. *Alderson B.* Process of execution must be returned immediately, being made returnable on execution.] The real question is, whether the new form of *capias* has not imposed a new duty on sheriffs. It is quite consistent with this record, that *Batten* had given bail, or made deposit in lieu thereof, for it is only averred that the defendant did not take him. [*Alderson B.* The only additional power given by section 15 is, that the judge may order the return of the writ in vacation; where the writ is executed, the old authority to compel the return remains. Where a party sustains damage by the sheriff's neglect of his duty to return the writ on its execution after an actual arrest, surely an action would lie. So, if the act makes the return-day of the writ depend on the day of the arrest, and makes the sheriff liable to execute it immediately, does it not raise a duty in the sheriff to return it in reasonable time within the four months? He is now to bring the defendant when he finds him, and not to have a day certain at which to bring him, as before the act; and the sheriff is held liable in the case of a *fi. fa.*, which is to be returned immediately (b). In the absence of the general issue, it must be taken for granted that the plaintiff had sustained injury unless the judgment is arrested. There must be a new trial unless the plaintiff consents to reduce the verdict to 40s. nominal damages.]

*Cur. adv. vult.*

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The judgment of the court was delivered on a subsequent day by

(a) See 8 Went. 486, Loft's Rep. 272.

(b) *Jacobs v. Humphrey*, 4 Tyr. 272.

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Lord ABINGER C. B., who, after stating the declaration, proceeded as follows: — When this case was spoken to the other day on a motion for a new trial or in arrest of judgment, the court entertained a long argument on the facts of the case, as to whether the plaintiff had sustained any damages, and what damages could be recovered; but that discussion became nugatory, as it turned out that there was no plea of the general issue. There were two issues on the record, which were found against the defendant: one was, whether *Batten* was indebted to the plaintiff; the other, whether the sheriff had used due diligence in arresting him; so that the only question was, what damages the jury ought to give? The jury gave 40*l.*, which was clearly unreasonable and must be reduced. The question on which I certainly felt great doubt does not therefore arise. If it had appeared on the face of the declaration that the plaintiff had sustained any damages from the sheriff's negligence, the judgment must have been arrested, and I do not think the plaintiff could have maintained the action without proof of actual damage; but the defendant, by not pleading the general issue to the declaration, must now be considered as having admitted the allegations in it, being, *inter alia*, that the sheriff neglected to take the defendant in the cause on the writ of *capias* when he might, and that, in consequence of his not being taken, he afterwards died. However improbable that may be, it must be taken for granted to be true; and then it appears on this declaration that the plaintiff has sustained a damage from the defendant's negligence. The defendant then being liable, the judgment cannot be arrested on this point. Another question agitated was, whether, since the new form of the writ of *capias*, the declaration should not have set forth the return-day of that writ. That depends upon this, whether the writ is returnable immediately.



whether the sheriff has the four months within which to execute it. We think that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and if he does not do so, that he is guilty of negligence, and will be liable for any damage which may result from that negligence. The rule must therefore be discharged, but the verdict must be reduced to 40s.

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Rule absolute accordingly.

See *Rex v. Sheriff of Middlesex*, 3 T. R. 133; Comyns' Dig. tit. Return, (F.)

WHEATLEY and Another (surviving partners of  
STEWART) against WILLIAMS (a).

**ASSUMPSIT.** The declaration stated, that heretofore and before the decease of *Stewart*, to wit, on 18 December 1827, an account was stated between the

(a) This report contains the judgment of the court on both the motions for new trials.


A., B. & C. being in partnership as auctioneers, sold books for the defendant, and paid him money on account of them.

Some were

returned to him as imperfect, of which they advised the defendant. He thereupon, in December 1827, wrote to them thus:—"I have received the imperfect books, which together with the cash overpaid on the settlement of your account amounts to 80l. 7s., which sum I will pay in two years." A. died before the two years had expired. Held, that the above instrument was a promissory note; and that, as such, it was evidence in an action brought within six years after December 1829, by B. & C. the surviving partners, to prove an account stated by the defendant with them and their deceased partner, it being alleged in the declaration, that the account was stated by the defendant with all three; for the account was stated in A.'s lifetime, though by the agreement annexed to it no cause of action accrued till two years subsequently, before which time his death had occurred.

The above promissory note, when produced at the trial, bore an agreement stamp only. Held, that if it was so stamped at the time the defendant signed it, it was admissible in evidence within the exception in s. 10 of the Stamp Act, 55 Geo. 3. c. 184. See also 37 Geo. 3. c. 137. s. 56.

In the absence of evidence that an instrument, e. g. a note bearing a stamp at the time it was produced in evidence, and requiring to be stamped at the time it was signed, in order to its being admissible in evidence, was not so stamped at the time it was signed by the party, the court will assume that it was stamped before it was so signed.

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plaintiffs and *Stewart* and the defendant; on accounting the defendant was found to be indebted to the plaintiffs and *Stewart* in the sum of 80*l.* 7*s.* thereupon afterwards, to wit, on &c., in consideration of the premises and that the plaintiffs and *Stewart* forbear and give time to the defendant for paying the said sum for the space of two years then following, the defendant promised the plaintiff and *Stewart* to pay them the said sum in two years' time. In default of payment, that the plaintiffs and *Stewart* did forbear to give time to the defendant for two years, but the defendant did not pay the said sum or any part thereof to the plaintiffs and *Stewart* in his lifetime, or to the plaintiffs since his death. There were counts for money paid by and on an account stated with plaintiffs and *Stewart* in his lifetime.

Pleas: to the first count, that it was not agreed between the plaintiffs and *Stewart* and the defendant in the manner and form as in that count alleged; to the second count, *non assumpsit*; to the whole declaration, the Statute of Limitations; concluding to the country, in default of an averment of verification (a); and lastly, a plea for goods sold and delivered, money lent, paid, and on an account stated between the defendant and the plaintiffs and *Stewart*. The plaintiff did not demur to the third plea, but added a similiter and issues on the other pleas.

(a) 1 Saund. 173.

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Where a document was shown to an attorney by his client as a matter of business in the course of a professional consultation with him, he cannot be examined as a witness on the point, whether that document was then in the same plight as it was produced stamped at the trial, viz. to prove whether it was stamped or not at the time of the interview.

A plea of the Statute of Limitations must conclude with a verification, and such a plea concluded to the country, and the plaintiff added a similiter, upon which the cause went to trial, the court ordered a new trial for want of a correct plea joined, both parties amending without payment of costs.

The particulars of demand were for 55*l.* 7*s.* claimed be owing to the plaintiffs as surviving partners of *Stewart*, for a balance of 55*l.* 7*s.* due on account of a sale by them, by auction, of the defendant's library in 1827, and of other transactions in *Stewart's* lifetime.

At the first trial at the *Middlesex* sittings after *Trinity* term 1835, it appeared that the plaintiffs were auctioneers, who had sold books for the defendant previous

December 1827. They produced in evidence the following letter in the defendant's handwriting, dated December 18, 1827, and stamped with a *1*l.** agreement stamp:—"Gentlemen, I have received the imperfect books (*a*), which, together with the cash overpaid on settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay you within two years from this date." Signed by the defendant, and addressed to the plaintiffs and *Stewart*. When *Stewart* withdrew from

firm in 1828, he took this and some other debts to himself, and gave credit to his partners for their share. He died in 1829, and his widow and executrix having claimed the debt from the defendant within six years before the present action was brought, received from him 25*l.* on account.

For the defendant it was argued, first, that the above paper was a promissory note, and could not be read in evidence for want of a proper stamp; secondly, that the agreement to forbear, alleged in the first count, was not proved; and lastly, that being an agreement not to be performed within a year, it was within sect. 4. of 29 *x.* 2. c. 3. the Statute of Frauds. *Parke* B. who presided at the trial, overruled the last objection, and allowed to suffer the plaintiffs to amend the third plea substituting a conclusion with a verification, and

Viz. books of the defendant sold by plaintiffs and returned by purchasers for being imperfect. The plaintiffs had debited the defendant with the amount.

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adding a proper replication. He directed a verdict for the plaintiff on the first and third issues, as far as related to the account stated (a), and for the plaintiff generally on the second and fourth issues. The damages were 55*l.* 7*s.*, giving credit for the 25*l.* paid to *Stewart's* executrix.

In *Michaelmas* term 1835, *Platt*, for the defendant, obtained a rule *nisi* to enter judgment for him on the third issue *non obstante veredicto*, or for a new trial. *Hoggins*, for the plaintiff, renewed his application to amend the third plea and the replication, the plaintiff retaining his verdict; and cited *Cooke v. Burke* (b). A rule *nisi* having been granted, both rules came on together in that term.

*Hoggins* showed cause against the rule for entering judgment for the defendant *non obstante veredicto*. [Alderson B. The main question is the admissibility of the document dated 18th *December*. Parke B. How do the plaintiffs supply the want of evidence of an account stated?] If the letter was a promissory note, still the stamp on it, though of an improper denomination or rate of duty, yet being of equal or greater value than the stamp which ought regularly to have been used thereon, was made valid by 55 *Geo. 3. c. 184. s. 10*. Nor is this case within the exception in that section, in cases where the stamp used on such instrument shall have been specially appropriated to any other instrument by having its name on the face thereof. The words "stamp used," mean that *wrongly* used; and "such instruments" refer to the previous words "instruments for or upon which any stamp shall have been used of an improper denomination." Till a very late period there was no stamp distinctively appropriated on

(a) Admitted by the first plea.

(b) 5 Taunt. 164.

the face of it to bills or notes. [*Parke* B. That argument would render nugatory all the prohibitions against stamping bills and notes after they are written (a), if they were afterwards stamped with an agreement stamp.] At all events, the other side should show that the stamp was imposed after the paper was written on. As to the third issue, the plaintiff may at all events retain his verdict, and amend without paying costs, for the defendant was guilty of the first departure. But sufficient appears to constitute an issue in law. Stat. 21 Jac. 1. c. 16. s. 3. provides that actions on the case shall be "commenced and sued" within six years "and not after." The bringing the action therefore by the plaintiff, amounts to an affirmation that it is commenced within six years, which the defendant denies; and thus traverses it by force of the statute. Issue then is well joined by the plaintiffs' similiter. [*Parke* B. All that this plaintiff has said by his declaration is, that there was a debt at some time; he has no where alleged that he is within the statute.] The plaintiff might join issue as tendered to him, see cases in notes to *Veale v. Warner* (b), or refuse to do so and introduce new matter in his replication. [*Parke* B. The difficulty is, that there is a negative without any thing on the record equivalent to an affirmative averment that the cause of action was within six years.] The plea of bankruptcy, which affords an analogous defence, concludes to the country. [*Parke* B. It was given by statute.] The form of concluding is not so provided. [*Parke* B. alluded to the old statute 5 Geo. 2. c. 30. s. 7. (c) as giving the form.]

(a) 31 G. 3. c. 25. s. 19. See the proper course of the holder of a bill or note stamped with a stamp of improper denomination to get it properly stamped, 37 G. 3. c. 136. ss. 5. 6; Bayley on Bills, 4 ed. 81, 82.

(b) 1 Saund. 327, n. (1).

(c) Enacting that the bankrupt may plead in general that the cause of

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PARKE B.—No correct issue has been joined on the third plea, upon which the jury could be effectually sworn, and all the facts properly given in evidence, supposing the plaintiffs to have brought themselves within 55 *Geo. 3. c. 184. s. 10.* As to the stamp, there must be a new trial, for no correct issue is joined on the third plea. In the absence of evidence of the fact we cannot presume that the writing in question was placed on paper not then stamped; but if it should turn out that this instrument, being a promissory note or bill, (as it appears to us to be) was in fact stamped after it was written, it will not avail the plaintiffs on a new trial.

Rule absolute for a new trial, with leave to both parties to amend, without costs.

The cause was tried again before *Gurney B.* at the sittings in last *Easter* term. The pleadings were amended, but the plaintiffs' evidence was substantially the same.

For the defendant, a gentleman who had been attorney to *Stewart* when the defendant's letter was written, was called to prove that it was not stamped till after it was written and signed by him. He swore that he saw it about the time it bore date, *Stewart* having consulted him on it in the way of his profession; and that he had charged *Stewart* for so doing. On his being asked what was the state of the paper at that time, the question was objected to, on the ground that the showing the paper to him was a privileged communication. The learned baron held that the objection was well founded, being of opinion that the part payment to the executrix of *Stewart* was a payment on account of the

action or suit accrued before such time as he became bankrupt, and may give the act and the special matter in evidence. 6 *G. 4. c. 16. s. 126.* is in the same terms. See 1 *P. Wms. 258*; 10 *Mod. 160, 247*; 2 *M. & S. 549.*

present claim, so as to take the case out of the statute; and was evidence for the plaintiffs on the account stated with them and *Stewart* in his lifetime.

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Verdict for the plaintiffs for 55*l.* 7*s.*

On the 7th *May* a rule *nisi* was obtained for a new trial, on two grounds: first, that *Bennett's* evidence as to the state of the letter was improperly rejected, as the communication to him was not privileged; and secondly, that the part payment to the executrix of *Stewart* being made to her, on account of her husband's estate, and not on account of the present plaintiffs, who had the legal right to sue as his surviving partners, was therefore not evidence to take the case out of the Statute of Limitations in an action by them for money paid by, and on an account stated with them and their deceased copartner.

*Erle* and *Hoggins* showed cause in this term. On the former argument the decision of the court turned, not on the instrument of *December* 1827 being a promissory note, but on the defective conclusion of the plea and traverse in the replication. [*Alderson* B. No, it was clearly held to be a promissory note.] Taking it to be so, the amount would not be due till 21 *December* 1829, which is within six years before this action was brought; so that no cause of action would arise on it till within the six years; it was evidence of an account stated with all the partners, *Stewart* being alive in *December* 1827. A promissory note is evidence of an account stated as between the maker and payee. Besides, the part payment, though to Mrs. *Stewart*, was made on account of the 80*l.* 7*s.* mentioned in the note. [*Alderson* B. The first question is, whether that document was admissible. If it has been improperly re-

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ceived, the question has not gone to the jury in a proper manner.] That involves the other point raised on this motion. *Bennett's* evidence, which was intended to exclude the note, was inadmissible; for any knowledge he had as to its condition at a time subsequent to its signature, must have been obtained by him when shown to him in his capacity as attorney to *Stewart*. That is the same as a communication to the attorney by way of oral question, what he, *Stewart*, must do to make the instrument available in evidence.

*Platt* supported the rule. The attorney's evidence was improperly rejected, for there is no proof that he was consulted on the subject of the stamp, so as to bring his knowledge of the state of the letter when shown to him, within the bounds of privileged communication. For if his advice was requested merely on the legal effect of the words written on it, the knowledge so imparted to him had nothing to do with the point to which the proposed question was directed. The distinction is, that he may be examined to a fact which he may know of his own knowledge without being an attorney. In *Buller's Nisi Prius*, 284, it is thus laid down:—"As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So, if the question were about a rasure in a deed or will, he might be examined to the question whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head." *Lord Say* and *Sele's* case is cited (a). Besides, in this case the document was produced by the *plaintiffs* as part of their case, which distinguishes this case from the usual

(a) Decided *Michaemas* 10 Ann. by Sir George Bridgman, with advice of the judges, as his authority for the above position.



instances of communications privileged as confidential. The question whether the witness saw the paper at a particular time or in a different plight, explains the instrument put in evidence by the plaintiffs without reference to any confidence of the client. [*Alderson* B. No person was called from the stamp office.]

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Secondly, if the letter ought not to be impugned by the evidence offered, the Statute of Limitations must prevail as to the money paid to Mrs. *Stewart*, and the account stated; for the account is stated as of *December 1827*, and the payment was made after the death of the partner *Stewart*, with his executrix and widow, and not with the three partners. If it is evidence of an account stated with the two plaintiffs legally interested in the debt, it is evidence of such account between the defendant and them only *without Stewart*. [*Lord Abinger* C. B. The payment appears to have been within six years of money due on an account stated with three partners. That revived the original liability.] If any account stated is proved, it is with the two only; but that is not alleged on the pleadings.

**LORD ABINGER C. B.**—This rule must be discharged. The point on the rejection of the attorney's evidence has been ingeniously argued by Mr. *Platt* on the passage in *Buller's Nisi Prius*, but that position must apply to a case where the attorney has his knowledge independently of any communication with his client, and cannot mean that where an attorney coming to consult with his client in a confidential character obtains information as to a collateral matter, which though not connected with the immediate subject of consultation, he would not otherwise have possessed, he can be permitted to give evidence of it. Suppose an attorney commissioned to search for one deed of his employer, gets information of or finds another deed

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which might injure him, could he give evidence of that other deed? Whatever therefore was the subject of confidential communication between *Stewart* and his attorney, if this note was exhibited to the latter during and in pursuance of it, all which appears on the face of the note, it is part of such privileged communication. On the other objection Mr. *Hoggins's* answer appears good; viz. that though that document produced by the plaintiff being admitted in evidence, only proves a statement of account to have taken place more than six years ago, it also shows that the plaintiffs could not sue for two years afterwards, which brings the accruing of the cause of action within six years before the commencement of this action.

BOLLAND B.—How could *Bennett* have acquired any knowledge on the question proposed, had he not been called in to advise his client *Stewart*, and upon that occasion found the note to be either properly stamped or the contrary, as the defendant wished to prove?

ALDERSON B.—I am of opinion that the privilege in question extends to all such knowledge as an attorney obtains, which he would not have obtained had he not been consulted professionally, though on another subject, by his client.

GURNEY B. concurred.

Rule discharged. Verdict to stand on the count for an account stated.

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JAMES FARRAR *against* BESWICK.

**T**ROVER for four horses; the declaration stating as usual, that the plaintiff was lawfully possessed of them as of his own property. Pleas: first, that the cattle in the declaration mentioned were not, at the time of the alleged conversion and disposal thereof, nor are they or any of them, the property of the said plaintiff, nor was he lawfully possessed of the same *as of his own property*, in manner and form, &c.; conclusion to the country. Secondly, that before the committing of the grievances, one *Cottrill* levied his plaint against one *Joshua Farrar*, in the county court of the sheriff of *Lancashire*, and within the jurisdiction of the said court, according to the custom of the same, and obtained judgment against him for a debt of 8*l.* 19*s.* 2*d.* before then due, and 10*l.* 11*s.* 11*d.* damages, for detention of the debt, which judgment remaining unsatisfied, there issued thereupon out of the said county court, a writ or precept in the nature of a *levari facias*, directed, among other persons, to the defendant, who was then the bailiff or officer of the said sheriff, commanding the defendant to levy the said sums of the goods and chattels of the said *Joshua Farrar*. Averment, that the writ was delivered to the defendant for execution, by virtue of which said writ or precept, he the defendant, as such bailiff or officer as aforesaid, afterwards, to wit, on &c., and within the time in the said writ or precept specified for the execution thereof as aforesaid, and according to the command and exigency thereof, and within the jurisdiction of the said court and the baili-

The plaintiff declared in trover, stating that he was possessed as of his own property of certain cattle, to wit, four horses, which the defendant converted and disposed to his own use. Pleas: first, that they were not the property of the plaintiff. Secondly, that a judgment was recovered against *J. F.*, and that a writ of execution issued, directed to the defendant, a bailiff, who seized them under an execution against the said *J. F.*, the same being the goods and chattels of the said *J. F.*, and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff. Replication: that they were the cattle and property of the said plaintiff, in manner and form as alleged in the declaration. Verdict for the plaintiff for half the value of the horses; the jury having found that they were the joint property of the plaintiff and *J. F.*—Held, that the issue raised upon the above plea was, whether the cattle were the sole property of *J. F.*, and that, upon the finding to the contrary, the plaintiff was entitled to retain his verdict.

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wick of the said sheriff, to wit, in the county aforesaid, “seized and took the said cattle in the said declaration mentioned, *the same being the cattle, goods and chattels of the said Joshua Farrar, and liable to be so seized and taken as aforesaid, and not being the property of the said plaintiff*, as for and in execution of the said writ or precept, and in pursuance and for the full and due execution thereof, he the said defendant, as such bailiff or officer as aforesaid, then and there, to wit, on &c. in the county and within the jurisdiction aforesaid, converted and disposed of the said cattle, goods and chattels by a fair, proper, and lawful sale thereof, in order to satisfy the said judgment so as aforesaid obtained by the said *William Cottrill*, such sale thereof being duly authorized and required by and according to the customs and usages in that behalf from time immemorial used and approved of in the said county in the execution of such and the like writs or precepts as aforesaid.” The return of the writ or precept was then averred, together with the money so levied under it, to the said court of the said sheriff, according to the commandment and exigency of the said writ or precept, and according to the duty of the defendant as such bailiff or officer as aforesaid in that behalf; which said “seizing, taking, selling, converting and disposing are “the said supposed grievances in the said declaration “mentioned, and whereof the said plaintiff hath above “thereof complained, &c.” Verification.

Replication to the last plea: that the cattle in the declaration mentioned were at the said times when, &c. and still are, the cattle and *property of the said plaintiff*, and not the cattle of the said *Joshua Farrar*, as in that plea alleged. Issue thereon.

At the last *Lancashire* assizes before *Parke B.* it appeared that the plaintiff and *Joshua Farrar* were carriers between *Halifax* and *Manchester*, using the

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horses in question in that business. The questions left to the jury were, first, whether the horses were the property of *James* or *Joshua Farrar*; and secondly, whether they were the property of both; the learned baron observing, that they might have been interested jointly in the profits of the carrying concern, but not in the horses with which it was carried on. The jury found that *James* and *Joshua Farrar* were joint owners of the horses, in equal moieties, and that they were worth 30*l.* Verdict for the plaintiff for 15*l.*, being half the value of the horses. In last term *Alexander* obtained a rule to enter a nonsuit, on the ground that the plaintiff *James* could not maintain trover for his undivided moiety of the horses taken under an execution against his partner *Joshua*. He contended, that if damages were recoverable in respect of the entirety of the property, the jury had denied that the plaintiff *James* had a right to recover; and if a moiety only, the whole was liable to seizure as partnership assets, each partner having a property in each horse.

*Cresswell* and *Wightman* showed cause in this term. The conversion having been admitted on the record, the only question raised on the pleas was, whether the horses were the property of the plaintiff, and as the jury have found him entitled to an undivided moiety of them, he is therefore entitled to retain this verdict; *Stancliffe v. Hardwick* (a). [Parke B. The question entirely turns on the form of the second plea, which alleges the horses to be the property of *Joshua Farrar*, "and not of the plaintiff." In the replication the plaintiff alleges the horses to be his own property, "and not of *Joshua Farrar*." At the trial I thought the plaintiff entitled to a verdict for 15*l.* On the motion for a new trial, it was said, that by omitting some

(a) 5 Tyr. 551; and see *Id.* 560.

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parts of it, the plea might be read as an admission of the plaintiff's right to a moiety of the horses, and denying the seizure of the horses under an execution against *Joshua*, the other joint owner, and that he dealt with them as they were legally entitled to do, subject to the plaintiff's right in them. It seems to me that if the plea had alleged that *Joshua* was interested in the horses taken, and that the defendant therefore seized them under an execution against him, it would have been good.] That may be doubted; and it is suggested, that under the new rules the third plea now raises the question made at the trial, viz. whether the plaintiff had such a property in the horses as would entitle him to maintain trover, or whether the whole property in them was in *Joshua*; for the plea now meant to claim the whole property as *Joshua's*, though it might have more definitely alleged that the defendant took them in execution to the extent of *Joshua's* interest in them. [*Parke B.* I thought at the trial that this plea was merely a denial of the plaintiff's title in the horses. The true question is, whether this is a plea, or a plea which seeks, though informally, to justify the conversion which is admitted.] Even if the defendant was entitled to seize and sell a moiety of the horses, the sale and disposal of the other moiety, like destroying them, in which case the joint owners of them might sue in trover (a). As the defendant now relies on his alleged right to take the whole of the property of *Joshua*, he was bound to prove that fact as laid, and not having done so, his defence fails. [*Parke B.* Here the parties are not tenants in common, but till *Barton v. Williams* (b), and *Heath v. Hubbard* (c).

(a) As to this see 5 Tyr. 553, 560; Co. Lit. 200 a, cited 2 Wms. 47 h.

(b) 5 B. & Ald. 395; affirmed on error, 3 Bing. 139; M'Leish 406, S. C.

(c) 4 East, 110; see 2 Saund. 47 h, note (s).

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I had no doubt that if a tenant in common sold the whole of the joint property, not being a ship, he would be guilty of a conversion by the mere act of sale (a); but *Holroyd* and *Best* Js. then doubted that position, and rested their judgment on other points (b). Those decisions turned on this, that a tenant in common had a remedy by recaption, if he could avail himself of it (c).] The defendant being a stranger to the interest of *James* and *Joshua*, had no defence on his first plea against the evidence of the plaintiff's possession. As on the last plea he denies the whole of the plaintiff's interest in the horses, instead of justifying the taking, by saying that *Joshua* was entitled to a moiety of them, and that he had therefore sold, that justification is not supported in evidence; and if the defendant had so pleaded, so as to be a good defence against *Joshua*, the case as regarded the present plaintiff would have been distinguished from *Stancliffe v. Hardwick*, by the defendant's not professing to be himself tenant in common. [*Parke* B. He claims all the interest which *Joshua* had as tenant in common, and no more.] Though one tenant in common has as much right to the possession of the whole chattel as another, this defendant, being the officer of the sheriff, had only such right under an execution against one, a tenant in common, as a stranger would have had, viz. one half only (d). The defendant could have no greater right than the tenant in common under whom he claimed, viz. to take the horses for a particular purpose, so that he could not sell the whole.

(a) See Comyns's Digest, tit. *Action on the Case on Trover* (E.), citing 2 Salk. 655.

(b) And see S. C. in Error, *M'Lelland and Younge*, 413; and 3 Bing. 146.

(c) The learned baron intimated, that if, instead of admitting the conversion, the defendants had intended to say that the sale of the whole interest, by a person entitled to a moiety only, is no wrongful conversion, the defendant should have denied the conversion of the plaintiff's share.

(d) See *Jacky v. Butler*, 2 Lord Raym. 871.

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[*Parke* B. Nor has a tenant in common a right to sell the whole. Then if he sells the whole is he guilty of a conversion? I have before alluded to this point, but here the defence is not as tenant in common. The sale of an entire chattel in market overt (*a*), by one of the joint owners, is not here in question, for that transfers the property at once, as against the others, and is a clear conversion; but I doubt whether this sale of all instead of part by the sheriff is a conversion by him, so as to sustain trover, or whether it is not the subject of a special action on the case. In my own practice at the bar I took the latter course; but here the plaintiff contends that the words of the plea, "the sole property of *Joshua*," cannot be rejected as surplusage.] The plea discloses facts which, had they been found by the jury to be true, would have barred the action. Whether the horses were the property of *Joshua* or not, was therefore a material question, and if they were not his, viz. his solely, the plaintiff *James* must retain his verdict.

*Alexander* contra. The question on this plea is, first, whether upon these facts the officer of the sheriff is liable in trover; and secondly, whether the plaintiff can have judgment on these pleadings? The horses were found to be the joint property of *James* and *Joshua*, and as the sheriff was bound by law to levy on *Joshua*'s chattels under the execution against him, he was bound to take his horses, though *James* had also an interest in them. The sheriff therefore was justified in seizing each horse, and was not bound by law to keep but to sell them. He could not sell them in moieties, though it may be that only a moiety of the produce was applicable to the uses of the creditor of *Joshua*. Then if the sheriff was compellable by law to seize and sell, there is no wrongful conversion for which trover

(*a*) See 2 Saund. 47 *h*, note (*s*); 5 B. & Ald. 405; 3 Bing. 145.



would lie; for the mere delivery of the horses to the purchaser in right of *Joshua*, the joint owner, did not amount to it, he being as much entitled to the possession of them as *James*. On the second point it is submitted, that if the above reasons, though justifying the sale, do not justify the sheriff's act in retaining more than half the proceeds of sale, so that the defendant's denial of interest in the plaintiff is not supported in proof, and the moiety is recoverable in a special action on the case or in trover, this plaintiff, having adopted the latter form of action, should have new assigned. As to the argument, that on the defendant's plea the only issue meant to be raised by him was, whether these horses were the sole or exclusive property of *Joshua Farrar*, it is plain that as the plea only follows the words of the declaration, it must receive the same construction. In the declaration the plaintiff claims the property of the whole, though *Joshua* had a joint interest with him, and the jury have denied that the plaintiff had the sole property in the horses, as alleged in his declaration (a).

**PARKE B.**—At the trial there was a full investigation of evidence adduced to show the horses in question to be the sole property of the plaintiff, though it afterwards appeared very probable that the plaintiff and *Joshua Farrar* had a joint interest in them. I told the jury, that if they thought so they ought to find for the plaintiff, being of opinion that the plea was in truth only a special traverse of the plaintiff's title to the cattle. I entertain the same opinion now. Taking the whole plea together, it in fact alleges that the whole property in them was in *Joshua*, the execution debtor,

(a) *Wightman* interjected—There is this difference between a declaration and a plea, that the latter, to be effectual, must bar all prior claims of the plaintiff.

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only. The defendant was obliged to allege what he has here done, or that *Joshua* had such an interest as the sheriff might seize. He might be *primâ facie* supposed to have intended the latter allegation from his opening statement, that the horses were *Joshua's*, and liable to be seized under the execution against him; but the plea goes on to state, that they were “not the property of the plaintiff.” I think that is equivalent to stating that the plaintiff had no title to them,—and yet they were the *sole* property of *Joshua*. The plea does not confess and avoid, but, after a special inducement, only traverses the plaintiff's allegation of property in the declaration. The only question on the first plea was, whether they were the plaintiff's property, and no right of any execution creditor could be set up by the defendant on that plea. I am by no means certain that if *Joshua* and *James* were jointly entitled to this property, the sheriff's act would amount to a conversion. Nor as at present advised, do I give any opinion that a plea stating that *Joshua* was jointly interested with *James* in these horses, and that the sheriff seized and sold the whole to levy the execution, might not have been a good answer to this action: for that point does not arise here. Till the doubt was raised in *Barton v. Williams* (a), I always understood that one joint tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of it, unless it was sold in such a way, *e. g.* in market overt, as to deprive the other owner of his interest in it. My judgment proceeds on this, that the allegation in the plea asserts the cattle to be the *sole* property of *Joshua*; whereas the replication reasserts the allegation in the declaration, that they were the property of *James*. In that view of the case the verdict must stand. The plea is not adequate to

(a) See *ante*, p. 1056.

the defendant's case. *Stancliffe v. Hardwick* shows that not guilty would have been misplaced.

BOLLAND B. concurred.

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ALDERSON B.—The whole plea taken together amounts to an allegation, that these horses were the sole property of *Joshua*. The replication merely re-asserts what the declaration had before stated, viz. that the plaintiff has such an interest in the horses as would enable him to maintain trover for them. The verdict appears to me to be well founded.

GURNEY B. concurred.

Rule discharged.

WHITFIELD *against* HODGES, Bail of SURRIDGE.

ON the first day of this term *Fish* obtained a rule to show cause why the judgment entered up should not be set aside, and an exoneretur entered on the recognizance of bail, on the ground that time had been given to *Surridge*, the principal in the original action, and that the defendant, one of his bail, was in consequence discharged. After the defendant had become bail for *Surridge* in the original action brought against him by the plaintiff, that action proceeded to issue, and on the 9th *November* notice of trial was given for the next *Essex* assizes. On the 24th *December*, *Surridge*, without acquainting his bail, gave the plaintiff a bill of exchange at two months for the amount of the debt, After notice of trial at the assizes and before trial, a baron's order was obtained to stay the proceedings on payment of debt and costs within three days, and in default thereof that the plaintiff should be at liberty to sign final judgment and issue execution thereon. Before the time for signing judgment arrived, the plaintiff agreed to give the defendant a month to pay the debt. Held, that as that time expired before judgment could have been obtained in the ordinary course of the court, the bail were not discharged.


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and paid the costs then incurred. The bill being dishonoured, on 27th *February* the plaintiff's attorney gave *Surridge* notice that he should go on to try the cause. The *Essex* assizes were fixed for 9th *March*; on 27th *February* a baron's order was obtained for staying proceedings on payment of debt and all subsequent costs (including briefs) on or before 1st *March*, and that in default thereof the plaintiff might sign final judgment and issue execution. The costs were paid on 29th *February*, and the plaintiff's attorney, without knowledge of the bail, gave the defendant a month to pay the debt. He, however, afterwards signed judgment against *Surridge* on the order, and on 6th *April* issued a *ca. sa.* against him, returnable on the 22d; on the next day the plaintiff sued out process against the present defendant, and no plea being pleaded in due time, the plaintiff signed the judgment, to set aside which this rule was granted. On 10th *June*

Erle and *G. T. White* showed cause. No time was given to *Surridge* beyond that in which the plaintiff could have obtained judgment and execution in common course. [*Parke* B. The bail can only be exonerated by giving time to their principal, for good consideration and on a binding engagement, which would prevent the plaintiff from going on against him.] Here judgment was obtained against *Surridge* earlier than it could otherwise have been had in ordinary course after the *Essex* assizes. Again, the baron's order was only conditional and not absolute for judgment. But, lastly, this was a private arrangement between the plaintiff and defendant, resembling the case of giving a *cognovit*. Now in *Stevenson v. Roche* (a) it was decided, that

(a) 9 B. & Cr. 707; see 4 Taunt. 456, *Bousfield v. Tower*; *Croft v. Johnson*, 1 Marsh. 59; 5 Taunt. 319, S. C.; *Price v. Edmunds*, 10 B. & Cr. 578; *Moore v. Bowmaker*, 2 Marsh. 392; 7 Taunt. 97, S. C.; *William*

unless longer time be given to the principal for payment of debt and costs than he would have had if the plaintiff had proceeded regularly in the action, the bail are not discharged by the plaintiff's taking a cognovit from him. Here the plaintiff was not entitled to sign judgment when the judge made the order, so that he gave up nothing by taking that order.

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Platt and *Fish* supported the rule. The general rule quoted from *Stevenson v. Roche* may be here admitted, for as in this case the judgment and execution were delayed by the plaintiff's agreement, the defendant did obtain time. During the progress of this cause the plaintiff became entitled, under a judge's order, to sign judgment on the 1st *March*, being an earlier time than he would have been in the ordinary course. As he did not so sign judgment, the bail were discharged, for they might have rendered *Surridge* immediately, whereas the time given enabled him to abscond. That time was given by a substantial arrangement. [*Alderson* B. How are the bail hurt?] The plaintiff had no right to put himself in a worse situation for obtaining his debt and costs; a court of equity would not have compelled the plaintiff to go on with the cause within the month given by him. The plaintiff should have obtained the earliest judgment he could, viz. on 1st *March*; now by the agreement entered into, the plaintiff could not proceed with the suit for one month. [Lord *Abinger* and *Parke* B. assented.]

LORD ABINGER C. B.—If the baron's order had been

v. *Whitaker*, 7 Taunt. 53; *Brickwood v. Annis*, 5 Taunt. 614, (as stated by Gibbs C. J. in *Willison v. Whitaker*, 7 Taunt. 54;) *Thackeray v. Frewin*, 8 Taunt. 30; *Melvill v. Glendinning*, 7 Taunt. 126; *Charleton v. Morris*, 6 Bing. 427; *Clift v. Gye*, 9 B. & Cr. 422; *Surman v. Bruce*, 10 Bing. 434; *Vernon v. Turley*, ante, 425.


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a hostile proceeding, and not the effect of a voluntary arrangement between the plaintiff and the original defendant, *Surridge*, the bail might have considered themselves entitled to the benefit of it for their own security, and the defendant's argument might have had weight; but the agreement having been voluntary, before judgment was or could be signed by the plaintiff, it falls within the principle laid down in the cases where a cognovit has been given, by which the plaintiff becomes entitled to sign judgment immediately, and before he could have otherwise done so. There, upon the same principle, the plaintiff might even give a further extension of time, if not extended beyond the period at which, in the ordinary course of things, judgment and execution could have been obtained. The bail have not been prejudiced.

PARKE B.—I am of the same opinion. This case is within the principle laid down by Lord *Tenterden*, as the time given never extended beyond that in which execution might have been obtained had the proceedings been adverse. I should be sorry to be obliged to decide otherwise, for if we did, the defendant's being out on bail might prevent many desirable settlements now made at chambers for saving expense. Here a baron's order was made on the 27th *February* for liberty to sign judgment and issue execution on the 1st *March*, if the debt and costs were not paid on that day. On the 29th *February* the parties make a new agreement to extend the time for paying the debt. Either that agreement bound the plaintiff or it did not. If he was not absolutely bound by it, the bail would not be discharged; but if it was binding on him, I hold that these parties, at any time before final judgment actually signed, were competent to waive the benefit of the baron's order, or to extend the time to a further

period, not exceeding the original limits within which the action, if hostilely carried on against the principal, could have arrived at judgment. Suppose that after one arrangement is made, and before the time fixed in it is expired, a plaintiff finds that he is more likely to get his debt paid by granting a little more extension of the time first agreed on, it would be very hard if he might make no fresh arrangement without losing the security of bail. Had the judgment been actually signed before the 29th, when the agreement to extend the time was entered into, the bail might have been discharged. The defendant's argument would go to discharge the bail, if a plaintiff's attorney gave a day's time to his antagonist, who had made a formal slip.

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BOLLAND B. concurred.

ALDERSON B.—It was argued that *Surridge* might have been rendered had execution issued on 1st *March*, and that the agreement to give time enabled him to abscond,—but he might have equally absconded before.

Rule absolute to set aside the judgment,
 without costs, and discharged as to entering the exoneretur (a).

(a) *Per Curiam*.—The bail must plead *instanter*, i. e. to-morrow.

DOE on demise of ROBERT GRAY *against* STANION.

EJECTMENT for a copyhold public-house. The demises were laid on the 3rd and 29th *October* 1835. At the last *Northamptonshire* assizes before with the lessor:—"1831, *Sept.* 2. S. S. (the tenant) purchased an estate in the parish of C., bought of R. G. (the landlord) at the sum of 100*l.* Received on account 10*s.* Mr. R. G. is willing to let the sum lie by paying 4 per cent." This agreement was signed by the parties, and 10*s.* deposit paid; S. S. remained in possession. Held, that the tenancy from year to year was not surrendered by operation

A tenant from year to year entered into the following agreement

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Bosanquet J. the plaintiff's admission to the premises in 1808 was proved. The defendant first became tenant of the premises in 1828 at a rent of four guineas a year, and continued in possession as tenant from year to year to the lessor of the plaintiff till *September 1* when they entered into the following agreement:—
"1831. *September 2.* *Samuel Stanion* in the parish of *Corbey* purchased an estate in the parish of *Corbey* aforesaid Bought of *Robert Gray* at the sum of *10* pounds received on account 10 shillings. Mr. *Robert Gray* is willing to let the sum lie by paying four per cent. witness my hand.

(Signed) *William Gregory*
Robert Gray.
Samuel Stanion
John Streather

The 10s. deposit was paid, and the defendant afterwards retained possession of the premises without paying rent or the remainder of the purchase money. Possession was demanded from him on the *2nd October 1831* by the agent of the lessor of the plaintiff. The defendant answered "he had bought the property and would keep it, and he had a friend who was ready to give him the money for it." The agent then said, that if possession was not delivered an action of ejectment would be brought. For the defendant it was insisted, that his tenancy from year to year still subsisted, not having been determined by a notice to quit, and *Peacock*

of law under 29 C. 2. c. 3. s. 3. so as to make the possession determinable by demand of possession without notice to quit, for there was an implied condition in the contract, that the vendor, the landlord, should make a good title.

To constitute a disclaimer of a landlord's title by a tenant, he must claim to the estate on a ground necessarily inconsistent with the continuance of his existing tenancy. Thus, where a tenant, who had agreed to purchase the demised premises from his lessor, had remained in possession several years without paying either rent or interest, and the lessor's agent demanded possession, the tenant's reply "that he had bought the property and would keep it, and had a friend ready to give him the money for it," was held no disclaimer so as to dispense with a notice to quit, and the lessor could bring ejectment.

Peacock (a) was cited for the lessor of the plaintiff. *Daniels v. Davis* (b) was cited to show that the tenancy from year to year had been determined by the agreement to purchase, and changed to a mere tenancy at sufferance; and that if it had not, the disclaimer by the defendant had made a notice to quit unnecessary. The learned judge was of that opinion, and directed a verdict for the lessor of the plaintiff, giving the defendant leave to move to enter a nonsuit. A rule having been obtained accordingly in last term,

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Waddington and *Mellor* showed cause in this term. The plaintiff is entitled to retain the verdict on both grounds. First, the defendant's tenancy from year to year was determined by his agreement to become the immediate purchaser of the demised premises; for as he thereby contracted a new and valid relation with his lessor, which was inconsistent with the continuance of the original tenancy, a surrender of the latter will be implied by law (c). If a man is let into possession under an agreement to purchase, he is a tenant at will (d); nor will his being already in possession on a tenancy from year to year alter that result. The buyer being the tenant must be presumed to have done all that was necessary to enable his purchase to take effect immediately. The defendant has relied on his purchase. The effect of an agreement by a tenant from year to year to purchase from his lessor, is not decided on at law, but occurs incidentally in *Daniels v. Davis*. Lord *Eldon* says, that a tenancy at will would be determined by such an agreement, adding, "Then as to a tenancy from year to year, which the law favours, is the situation of a person in possession as such tenant, different

(a) 16 Ves. jun. 57.

(b) 16 Ves. jun. 252.

(c) See 1 Wms. Saund. 236, a, note.

(d) Right d. *Lewis v. Beard*, 13 East, 210.

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in equity with regard to third persons, if making an agreement with his landlord to purchase the premises instead of giving up the possession, and re-entering under that agreement, he retains the possession without going through that ceremony?" In principle, a tenancy at will is on the same footing as a tenancy from year to year, in respect of being determined by the tenant's agreement to purchase. [*Parke* B. Must not you show that at law this agreement would be an answer to an action for use and occupation, brought to recover the value of the premises since 2 September 1831? Did the rent cease on that day, and did this agreement substitute a pure tenancy at will without liability to rent? If I agree to buy land, and am not in possession, the agreement only gives me a right to go into equity without vesting in me any interest in the land. The tenancy at will is not constituted by the agreement, but by the letting into possession under it. It is that only which prevents the party from being treated as a trespasser.] Unless the relation of landlord and tenant remained, a demand of possession would be sufficient, and no notice to quit would be requisite. [*Parke* B. Your argument turns on the particular construction of the agreement, as for an absolute, unconditioned payment of interest, and not of rent. If it is to purchase without inquiry as to the title, so that the defendant became an immediate debtor for 100*l.*, it may determine the tenancy; but if it be only an agreement of the ordinary kind, to buy, should a good title be made, can the defendant be bound to pay the purchase money before the title is made out?] In *Hamerton v. Stead* (a) a tenant from year to year agreed, during a current year, for a lease to be granted to him and A. B. A. B. accordingly entered, and thereafter occupied jointly with the former tenant. But the court held,

(a) 3 B. & Cr. 478.

that the agreement and joint occupation determined the former tenancy. The principle of that case applies strongly to the present.

Secondly, if the effect of the agreement was not to turn the tenancy from year to year into an estate at will, the defendant's conduct amounted to a disclaimer of his lessor's title, and the demand of possession was sufficient without a notice to quit. See *Bull. N. P. 96*, *Doe v. Williams* (a), *Bower v. Major* (b), *Doe d. Grubb v. Grubb* (c), *Doe v. Lord Cawdor* (d), *Doe v. Rice* (e). [*Alderson B.* Why should not the defendant have remained tenant from year to year under an agreement to purchase the demised premises? In equity, where what is agreed to be performed is taken to be performed, this agreement would be taken to have put an end to the tenancy.]

Humfrey supported the rule. The tenancy from year to year remained in force after the agreement; for a covenant for good title was implied, and the court will not intend that the purchase money was to be paid without it. The question in *Daniels v. Davison* could not have arisen had the tenancy been altogether determined, nor was there a disclaimer. The demand was of immediate possession, to which the landlord had no right; and the refusal was of that request, and not a disclaimer of any right of the lessor. [*Parke B.* You say that the substance of the defendant's answer was, I will not give up a possession to which you have no right. I insist on the agreement, and whatever rights it may give me.] Had the defendant refused to complete the purchase, the landlord might have demanded instant possession on his equitable title. The answer

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(a) Cowp. 622.

(b) 1 Brod. & B. 4.

(c) 10 B. & Cr. 816.

(d) 4 Tyr. 852.

(e) 2 M. & Scott, 454; S. C. 9 Bing. 356. And see 3 Wils. 25.

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of the defendant is not necessarily inconsistent with his character as tenant to the lessor of the plaintiff.

Cur. adv. vult.

PARKE B. now delivered the judgment of the court.—In this case, which was an ejectment to recover a house, tried before my brother *Bosanquet* at the last assizes for *Northampton*, a point was reserved for the consideration of the court, as to the right of the lessor of the plaintiff to recover, without having given half a year's notice to quit. The defendant occupied from the year 1828, as tenant from year to year, at four guineas annual rent. On the 2nd *September* 1831 an agreement was drawn up between the lessor of the plaintiff and the defendant, to this effect:—"1831 *September* 2, *Samuel Stanion* purchased an estate in the parish of *Corbey*; bought of *Robert Gray*, at the sum of 100*l.*, received on account 10*s.* Mr. *Robert Gray* is willing to let the sum lie by paying four per cent." The agreement was signed by the parties, and 10*s.* deposit paid.

On the 2nd *October* 1835, the agent of the lessor of the plaintiff demanded possession from the defendant. The defendant said "he had bought the property and would keep it, and he had a friend who was ready to give him the money for it;" on which the agent informed him, that if possession was not delivered, he should bring an action. An action of ejectment was accordingly brought.

The learned judge directed a verdict for the plaintiff, reserving the point.

On the argument on showing cause against the rule *nisi* for a new trial, it was insisted, on the part of the lessor of the plaintiff, that a notice to quit was unnecessary, and that, on two grounds:—

First, that by the agreement of the 2d September 1831, a new tenancy at will was created, which put an end to the tenancy from year to year; and that such new tenancy at will was determined by a simple demand of possession from the tenant.

Secondly, that if the tenancy from year to year was not so determined, the defendant's declaration on the 2d October, to the agent of the lessor, amounted to a disclaimer. We are of opinion, that neither of these reasons are sufficient to dispense with the usual notice to quit.

As to the first, there is no doubt, but that if there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will; *Right d. Lewis v. Beard (a)*. It is not however the *agreement*, but the letting into possession, that creates such tenancy; for the person suffered so to occupy, cannot on the one hand be considered as a *trespasser* when he enters; and on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be, that from the date of it, (or any other certain time,) the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and was to cease to pay rent, as tenant from year to year, a tenancy at will would probably be created after that time; and the acceptance of such new demise at will, would then operate as a surrender of the interest from year to year by operation of law. But if the agreement

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is conditional to purchase, only *provided* a good title should be made out, and to pay the purchase money, *when* that should have been done, and the estate conveyed, there is no room for implying any agreement to hold as tenant at will in the meantime, the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not. And this is strongly illustrated by supposing such an agreement to be made by a termor for a long term of years, of considerable value beyond the reserved rent; in which case, it would at once strike any one as impossible to give this effect to the agreement. In such a case, no one would doubt but that the intention was, that the lease should not be given up unless the purchase was completed. Is then the contract in question, a contract of this conditional nature, to purchase for 100*l.* *provided* a good title should be made, and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for, in the first place, in contracts for the sale of real estate, an agreement to make a good title is always implied, of which the case of *Souter v. Drake* (a) is a strong instance; and in the next, it is out of the question to suppose that this defendant meant to be obliged to pay the purchase money, without some conveyance of the estate, although subject to a mortgage for the purchase money.

For these reasons, we think that the tenancy from year to year was not determined in this case by the defendant's entering into this agreement. What the effect of such a contract would be in a court of equity it is quite unnecessary to consider.

The remaining question is, whether that which passed between the plaintiff's agent and the defendant,

(a) 5 Bar. & Adol. 992. See *Doe v. Birch*, ante, and *Walter v. Maund*, 1 Jac. & W. 181.

on the 2nd *October*, was a disclaimer so as to supersede the necessity of a regular notice to quit.

In the earliest reported case on this subject, *Throgmorton v. Whelpdale* (a), it is said that such notice is necessary, unless the tenant has *attorned* to some other person, or done some other *act* disclaiming to hold as tenant to the landlord. In *Doe v. Williams* (b) Lord *Mansfield* says, where the *possession is adverse*, no notice is necessary; and in that case there had been an attornment, or what was equivalent; for the defendant defended as landlord to the tenant from year to year. But this rule is too narrow, and from subsequent cases, it does not appear to be necessary that any *act* should be done as distinguished from a verbal disclaimer. A disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient. Lord *Kenyon*, in *Doe d. Pasquali* (c), says, “that if the tenant puts *his landlord at defiance*, he might consider him either as a tenant or trespasser, and eject him without any notice to quit;” and in *Brown v. Major* (d), in the analogous case of a composition for tithes, the declaration of an occupier, who refused to set out his tithes in kind, insisting that he was *exempted by a modus*, was held to be a sufficient disclaimer of the composition, so as to dispense with half a year’s notice to determine it. And in other cases, in which the declaration of the tenant has been held insufficient, no question has been raised as to the necessity of some act (e), as distinguished from disavowal by word or writing. But in order to make a verbal or written disclaimer sufficient, it must amount to a *direct*

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(a) Bull. N. P. 96.

(b) Cowp. 622.

(c) Peake, N. P. 197. As to this case see 4 Tyr. Rep. 855.

(d) 1 Bing. 4.

(e) *Doe v. Pusquali*, Peake, 196; *Doe v. Lord Cawdor*, 4 Tyr. 852; 1 Cr. M. & R. 398, S. C.

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repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord, as such, by requesting further information, will not be enough, as appears from the cases already referred to (a); nor will a mere refusal to pay rent suffice, as appears from the case of *Doe v. Pasquati*. A refusal to deliver possession, or a declaration that he will continue to hold possession, cannot have that effect, at a time when the landlord has no right to claim it, as was the case in this particular instance.

The only point therefore remaining is, whether the defendant's saying that he had "*bought the property and would keep it*, and had a friend who was ready to advance the money," is by necessary implication a disavowal of the relation of tenant from year to year. We are all of opinion that it is not, because this is not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. The defendant had a double right to enforce his bargain for the purchase of the estate, and to continue in the meantime to hold it as tenant from year to year; and this declaration is in truth no more than an avowal that he should insist on his contract of purchase, and was ready to perform it. This appears to us to be quite consistent with the continuance in the meantime of the tenancy from year to year. We therefore think that the rule *nisi* for a nonsuit must be made absolute.

Rule absolute.

(a) And see *Doe d. Calvert v. Froud*, 4 Bing. 555.

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SIEBERT and CRESSWELL, Assignees of MITCHELL, a bankrupt, against SPOONER.

ASSUMPSIT for use and occupation of certain pasture land, and the eatage of grass thereon, laying the promises to the plaintiffs as assignees of *Mitchell*, a bankrupt. Counts for money had and received, and on an account stated. Pleas: first, the general issue; secondly, that *Mitchell* never was nor is a bankrupt. This cause was tried before Lord *Denman* C. J. at the last *Yorkshire* assizes. *Mitchell* had been in trade as a cloth manufacturer in partnership with another person. The fiat issued against him alone on the 14th *October* 1834. To prove the act of bankruptcy the plaintiffs produced a deed of assignment, dated 26th *August* 1834, between *Mitchell* of the one part, and the defendant of the other part, by which, after recital that *Mitchell* was indebted to the defendant, his brother-in-law, in 400*l.* on bond, and also in 90*l.* on simple contract, *Mitchell* assigned and conveyed to the defendant all his household goods and effects in his dwelling-house, all his tenant right in the farm occupied by him, and all his farming stock, horses, cattle, and all other his farming effects, and also all his stock in trade and utensils, and all other his personal estate whatsoever. They next produced indentures of lease and release of 5th and 6th *September* 1834, by which *Mitchell* conveyed all his freehold property to the defendant. The plaintiffs also put in the proceedings in bankruptcy. Among the depositions was one of the defendant. The plaintiffs contended that the bankruptcy was proved, inasmuch as the first-mentioned deed conveyed away the whole of the grantor's effects, so that an act of bankruptcy had been *ipso facto* committed under 6 *Geo.* 4. c. 16. s. 3. The defendant's

A trader assigned to his creditor all his effects and stock in trade, without receiving any present equivalent. Held, that that was in itself an act of bankruptcy, as well since 6 *G.* 4. c. 16. s. 3. as before that act, and that it was not a question for a jury, whether the assignment was fraudulent in fact or not.

Quære, if the assignment had been made for a temporary purpose merely?

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counsel answered, that no act of bankruptcy was proved, as no such result could arise from the deed produced, for it must be shown to have been executed with intent to delay or defraud the creditors. The defendant then attempted to prove from his deposition, which had been made evidence by the plaintiffs, that he had agreed to buy the freehold estate from *Mitchell*, and that the assignment of the personalty by the deed of *August 1834* was given as a security for the money lent him by the defendant, till the deed of conveyance was executed. Lord *Denman* said, that the case must go to the jury, and charged them, that if the deed of assignment of *August 1834* was fraudulently executed by *Mitchell*, with intent to defraud his other creditors, or in contemplation at the time of bankruptcy as inevitable, or very probable, it would constitute an act of bankruptcy; but that if executed with neither design it would not have that effect, though all the party's stock in trade passed by it. He added, that it was for the plaintiffs to establish that there had been a fraudulent preference (a). Verdict for the defendant. In last term *Blackburne* obtained a rule for a new trial on the ground of misdirection, citing *Stewart v. Moody* (b), *Carr v. Burdiss* (c), and *Botcherby v. Lancaster* (d). [*Parke B. Newton v. Chantler* (e) is a case strongly in point. The security was there given for a precedent debt.]

Milner (Sir *William Follett* with him) showed cause. It was left to the jury to consider whether the deed of assignment of *August 1834* was made by way of fraudulent preference, and in contemplation of

(a) See 5 Tyr. 965.

(c) 14. 309.

(e) 7 East, 138.

(b) 5 Tyr. 493.

(d) 1 Adol. & Ell. 77.

bankruptcy at the time, and they have found that it was not. [*Alderson* B. The question is, whether the conveyance is not *per se* an act of bankruptcy. How is a man to carry on his trade who has by deed assigned over all he had in the world to secure a precedent debt? *Parke* B. Was there any consideration for the conveyance in the shape of an advance of present cash at the moment, so that it might be said that by assigning his property he procured money with which he might pay his creditors?] Part of the title-deeds of this property had been deposited with the defendant on a previous occasion as a security for a debt. [*Parke* B. That only confessed an equitable claim.] *Baxter v. Pritchard* (a) shows that the assignment by a trader of his whole stock to a purchaser for a fair price is not an act of bankruptcy. [*Parke* B. That case differs from this in the important particular, that the trader there got an equivalent for his goods in the purchase money of the property sold, with which, had he been so disposed, he might have bought other goods. Lord *Abinger* C. B. I was counsel in that case, and understood the decision to rest on this, that the trader had received a present sum of money for his stock, which he might have divided among his creditors. *Newton v. Chantler* (b) appears decisive on the question.] That case has been doubted, and proceeds on the assignment in dispute, which was only made for a temporary purpose, till further deeds were prepared. [*Parke* B. We find no evidence as to that on the report, but if it was so, it was still a conveyance of all the party's effects, by which he parted with all his interest in them. Even assuming that there was a secret trust to reassign on payment of the debt, nothing was left for the creditors in the interval, for all passed away by the deed.]


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(a) 1 Adol. & Ell. 457.

(b) 7 East, 138.

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On the deposition as well as the deed it was for the jury to decide the question of fraud, viz. whether the conveyance was fraudulent at the time, viz. made with intent to defeat or delay the creditors, within 6 Geo. 4. c. 16. Upon that the jury have found in the negative. It has always been assumed that a deed of this kind must inevitably delay the creditors, and it has on that account been taken for granted to be an act of bankruptcy. But the mere sale of a bankrupt's share in a stock in trade will not have such an effect, *Ross v. Haycock* (a). [Alderson B. There the trader received the sum of money for which his whole effects sold.] Here, as in that case, a *bonâ fide* consideration for the assignment existed, though it preceded instead of following it. [Lord Abinger C. B. Is this point to be differently viewed since the late bankruptcy act of 6 Geo. 4. c. 16.? The fraudulent conveyances, which before that act could only be avoided by the assignees, are now made *per se* acts of bankruptcy; and the only question is, whether the transfer by a trader of his whole property to one particular creditor, leaving nothing for the rest, is not necessarily and in itself a fraud on the others.] The partnership was not determined by the deed, so that the property of the firm could not pass in discharge of a separate debt of *Mitchell*. Then it did not necessarily prevent the carrying on the trade.

Blackburne and *Hoggins* contra were stopped by the court.

LORD ABINGER C. B.—I am of opinion that there must be a new trial in this case. Had the facts sug-

(a) 1 Adol. & Ell. 460, n.; and see the cases collected 5 Tyr. 140, note.

gested in argument been clearly proved, viz. that this assignment took place for a temporary purpose, and for the object of securing the grantee till another deed could be drawn and executed, the argument might have had some foundation. But in the absence of such evidence the general law of bankruptcy must apply, viz. that an assignment by a trader of his whole effects to a particular creditor, not for a present equivalent, but for an outstanding debt, is necessarily an act of bankruptcy, for the very nature of the transaction prevented him from carrying on his trade. Had this case rested entirely on the 3d section of 6 Geo. 4. c. 16. there might have been some difficulty, for by that section new acts of bankruptcy are created which were not such before. Thus by that section, any “*fraudulent* gift, delivery, or transfer by a trader of any of his goods and chattels, is made an act of bankruptcy.” That word “*fraudulent*” might be said to apply to some fraud in fact, *i. e.* and that such a deed of assignment as that before us would stand, unless some fraud appeared in the circumstances attending its execution. But the meaning of section 3 is cleared up by section 4; for as it was always understood that under the old decisions on bankrupt law, a conveyance in *præsentî* of a trader’s whole effects to a particular creditor, constituted in itself an act of bankruptcy, that section shows that the new bankrupt act maintains the law on that subject as it stood before. The jury should have been informed that the assignment in question was in itself fraudulent, and that there was no question of fact upon which they could exercise a discretion.

PARKE B.—It is well settled, that where a trader makes an assignment of all his effects, or of all

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except a small part (a) to a particular creditor, it is *ipso facto* and of necessity an act of bankruptcy, without its being requisite to show actual fraud. In *Worseley v. De Mattos* (b), *Wilson v. Day* (c), and *Newton v. Chantler* (d), no fraud appeared, and the deed was executed by the party whilst under the pressure of an arrest by the grantee; yet in all those cases it was decided, that an assignment by a trader of all or the principal part of his goods, is an act of bankruptcy, whether there was fraud in fact or not. Now upon the evidence reported to us, the bankrupt possessed nothing but what was assigned by him to the defendant, so that the case should not have been left to the jury at all. Whether, as suggested, *Mitchell* did in fact possess other property which he had not assigned, will be for the jury on the new trial (e).

BOLLAND B.—I am of the same opinion. *Hassels v. Simpson* (f) is expressly in point, for no fraud was suggested, and the same question arose, whether the execution of such a deed as the present was in itself an act of bankruptcy; and Lord *Mansfield* said, “It has been settled over and over, that if a trader makes a conveyance of *all* his property, that is *instantly* an act of bankruptcy.” Without stating that there was any question for the jury to say whether it was fraudulent or not, he held the deed fraudulent, “because it destroyed the capacity of trading;” adding, “in this case *Jackson*, i. e. the bankrupt, could not sell an ounce of property after the assignment, the whole belonging to another man. It was a fraud in *Jackson* to

(a) See *Gayner's* case cited 1 Burr. 477.

(b) 1 Burr. 467.

(c) 2 Burr. 827.

(d) 7 East, 138.

(e) As in *Carr v. Burdiss*, 5 Tyr. 136.

(f) Doug. 92.

deal with any body as a trader." Now this deed purports to convey all *Mitchell's* effects. It will be for the defendant to prove to another jury, that there were other effects which did not pass by this assignment.

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ALDERSON B.—I am of the same opinion. One of the first things I learnt in the law was, that a conveyance of *all* a man's estate and effects was in itself, without more, an act of bankruptcy; and that an assignment of any part of them was an act of bankruptcy, if fraudulently made. Then arose a class of cases alluded to by Mr. *Milner*, where a trader's whole estate and effects were assigned in consideration of a full money payment. In such cases of present equivalent it is only the nature of the property possessed by the seller which is changed, and he retains a property in the matter given in exchange equal to that which he had before. Were that otherwise, if a small trader sold the last packet of goods in his shop, so as to leave him none with which to carry on his trade, he would have committed an act of bankruptcy. But that class of cases must not be confounded with the decisions I have first adverted to. And section 4 of 6 *Geo. 4. c. 16.* explains the terms of the next preceding section. For it in effect says, that if a commission issues against a trader within six calendar months after execution by him of an assignment by deed, of all his estate and effects for the benefit of *all* his creditors, it shall still be an act of bankruptcy (*a*). That section also requires certain notices to be given in order to acquaint all the bankrupt's creditors of the execution of the deed. The reason of that enactment is simple, viz. that the creditors, if dissatisfied with the trustees

(*a*) See the authorities collected 1 *Adol. & Ell.* 458, note; and 3d edit. of Lord Henley's *Bankrupt Law*, p. 26.

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named by the debtor, may obtain other depositaries of the trust, by taking out a commission against him. As the question of fraud ought not to have been left to the jury, there should be a new trial (a).

**Rule absolute.**

(a) See *Abbott and Others, assignees, v. Burbage*, 2 Bing. N. C. 444.

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**BELL against HARRISON and Others (a).**

In a local action, the court or a judge cannot, till after issue joined, (3 & 4 W. 4. c. 42. s. 22.) order the issue to be tried in an adjoining county, on affidavits that a fair and impartial trial cannot be had in the county where the venue is laid.

**T**HIS was an action on the case to recover compensation from the defendants, for injury sustained by their railway passing near the plaintiff's house at *South Shields*, as well as by the smoke and vibration created by locomotive engines and carriages used thereon. The venue was laid in *Durham*, in which county the premises were situate. The plaintiff swore to his belief, that he could not have a fair and impartial trial in that county, by reason of there being throughout it numerous railways, in which very many persons were interested and employed, and had in consequence a strong feeling in favour of their continuance. That as the city of *Durham* is twenty miles from *Shields*, and only nine from *Newcastle*, it would be more convenient and less expensive to both parties to try in *Northumberland*, and to change the venue accordingly, a rule having been granted for that purpose. The defendant's attornies deposed, that a view would be necessary to the defence, and that if the venue was changed to *Northumberland* it could not be obtained, for want of power in the defendants to enforce the attendance of the sheriff, or a jury of that county

(a) *Trinity term 1835, June 17.*



to view premises in *Durham*. No plea had been pleaded.

*Wightman* obtained a rule to try the issue in *Northumberland*, citing 3 & 4 W. 4. c. 42. s. 22.

*Watson* showed for cause that the venue cannot be changed on special grounds before issue joined (a). That is analogous to this case.

*Wightman* supported the rule, on the ground that the affidavits disclosed the issue which would be raised for trial (b). [*Parke* B. How can the plaintiff foresee what the issue when joined will be? It may be licence or accord and satisfaction, or some other matter in which the jurors of *Durham* have no interest at all.]

LORD ABINGER C. B.—The defendant may plead not guilty, in which case the proof of nuisance would be on the plaintiff; when that happens, and he is made certain of the issue to be tried, he may go to a judge's chambers, who may order the issue to be tried in another county, though the venue is by law local (c). We have no such authority at present under the act cited. We shall not allow the defendant any costs; they will be costs in the cause.

*Per Curiam*.—

Rule discharged accordingly, without costs (d).

(a) See *Youde v. Youde*, 4 Dowl. Pr. C. 32; *Cotterill v. Dixon*, 3 Tyr. 705; *Notts v. Curtis*, 2 Tyr. 501.

(b) But see *Rohrs v. Sessions*, 4 Tyr. 275.

(c) See cases collected 1 Chitt. on Pleading, 4 ed. 242.

(d) See *Youde v. Youde*, 4 Dowl. P. C. 32.

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LEES *against* FRY (a).

A cognovit subscribed thus: "witness to the signing by the said R. F., (the defendant,) C. B. P. attorney for the said defendant," is not only a sufficient declaration of C. B. P. being attorney for the defendant, but also a sufficient statement that he "subscribes as such attorney" within Reg. Gen. Hil. 2 Will. 4, No. 72.

THE defendant had given a cognovit to the plaintiff, his signature to which was witnessed thus, "witness to the signing by the said *Robert Fry, C. B. Passman*, attorney for the said defendant." Judgment had been signed and execution executed against the person.

*Archbold* moved to set aside the cognovit, with the judgment and execution issued thereon, on the ground that the defendant's execution of the cognovit had not been subscribed by any attorney; who besides stating himself to be attorney for the defendant, also stated that he subscribed "as such attorney;" citing Reg. Gen. Hil. 2 W. 4., No. 72, and *Fisher v. Papani-colae* (b).

*Per Curiam*.—(Lord ABINGER C. B. PARKE, BOL-  
LAND, and GURNEY Bs.) In the case cited it did not appear on the cognovit, that any attorney for the defendant had subscribed his name, whereas here it does.

Motion refused on that ground.

(a) *Trinity term 1835, June 15.*

(b) 4 Tyr. 44.

DOE on the demises of the Churchwardens of  
LLANDYSILIO *against* ROE (a).

Motions involving points of law and construction of an act of parliament

THE declaration containing the several demises following; viz. first, of the churchwardens of the

(a) *Trinity term 1835, June 10 and 19.*

ought not to be taken at chambers, and should be made in full court.

Churchwardens and overseers suing under 59 G. 3. c. 12. s. 17, must sue in their own names, describing themselves as churchwardens and overseers of the poor of the parish; and the court directed counts on demises by them, in which they were termed churchwardens and overseers only, without setting out their names, to be struck out.

parish of *Llandysilio*, in *Anglesey*; second, of the overseers of the poor of that parish; third, on the joint demise of the churchwardens and overseers of the poor of that parish; fourth, on the joint demise of the churchwardens and overseers, naming them; fifth, on the demise of *Henry William*, Marquis of *Anglesey*; and lastly, on the demise of *Blackwell*.

This ejectment having been served, *Rawlinson*, for the tenant in possession, obtained a rule to show cause why the three first demises and counts, parts of the declaration, should not be struck out, on the ground that the christian and surnames of the churchwardens and overseers in these demises were not individually set forth. He cited *Rex v. All Saints, Derby* (a), and *Woodcock v. Gibson and Others* (b), to show that no parish property vested in the churchwardens and overseers, unless the proper number of them was annually appointed, so that it was material for the defendant to have information on that head, which this declaration did not afford.

LORD ABINGER C. B.—Churchwardens and overseers for the time being, suing in relation to parish lands, &c. under 59 *Geo. 3. c. 12. s. 17.*, must sue in their own names, describing themselves as the churchwardens and overseers of the poor of the parish for which they act.

Take the rule.

It was afterwards made absolute, with costs, by *Alderson* B. sitting alone, on the last day of the term, after hearing *J. Jervis* against it; the learned judge saying, that cases like the present, involving construction of statutes and points of law, are very properly

⌚ (a) 13 East, 143.

(b) 4 B. & Cr. 462.

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brought before the court, and ought not to be taken at chambers (a).

Leave to amend was given.

(a) See *Phillips v. Pearce*, 8 D. & Ry. 462; 5 B. & A. 432, S. C.

### MUSPRATT *against* GREGORY.

Certain premises were used as salt-works for making salt, and vending it there to purchasers who sent their craft for cargoes of it, into a cut made on the premises for convenience of loading salt, and communicating with a public navigation. The plaintiff, an alkali maker, sent his boat into the cut to be loaded with salt bought by him to make alkali with. Held, that the vessel was liable to distress for arrears of an annuity charged on the land on which the salt-works stood, by the maker and seller of the salt. *Parke B. dissentiente.*

**T**RESPASS for taking and detaining a boat or vessel of the plaintiff called a flat. The plea set out, at length, an indenture dated 19th April 1830, being a grant by one *W. Furnival* of several annuities issuing out of certain salt-works situate at *Wharton*, in the county of *Chester*, to *F. Kemble* and *F. Lock*, as trustees for the several annuitants; and stated, that the boat or vessel of the plaintiff, in the declaration mentioned, being in a certain cut or canal, part of the premises in the said indenture mentioned, upon which the several annuities were charged or chargeable, and out of which they were yearly issuing and payable, the defendant, at the said time when &c., as the servant and bailiff of the said *F. Kemble* and *F. Lock*, and by their command, seized and took the said boat or vessel, so then being and lying in the said cut or canal &c. as and for a distress for the arrears of the said annuities &c. &c.

Replication, that before any of the said times when &c. the plaintiff was, and thence hitherto hath been and still is a manufacturer and trader and dealer in certain alkalies, to wit, a certain alkali called black ash, and a certain other alkali called white ash, and during all the time aforesaid has exercised and carried on such manufacture, trade, and dealing as aforesaid, to wit, at

certain premises of him, the plaintiff, in the county of *Lancaster*; and during all the time aforesaid he, the plaintiff, hath, from time to time, made and manufactured divers great quantities of such alkalies, and dealt in and sold the same as aforesaid, which said manufacture, trade, and dealing, was a useful manufacture &c., and of great benefit: and the plaintiff further says, that for the purpose of such manufacturing and making such alkalies as aforesaid, great quantities of salt are required, which are used in the making and manufacturing such alkali as aforesaid; and that, during all the time aforesaid, the plaintiff had occasion for, and required great quantities of salt, for such purposes as aforesaid; and that the plaintiff, for a long time before any of the times when &c. was used and accustomed, from time to time, to use and employ the said boat or vessel, in the declaration mentioned, for the purpose of and in bringing, fetching, and carrying divers great quantities of salt to the plaintiff's premises, to be used by him in such manufacture as aforesaid, from the salt works hereinafter mentioned, which said salt was, during all that time, from time to time, received in and by such boat in the said cut or canal, at the place in which she was so seized and taken as aforesaid, and thence was carried in and by the said boat down the said cut or canal into a river or navigation, and thence by certain other rivers and navigations to the plaintiff's said premises: and the plaintiff further says, that long before the said *F. Kemble* and *F. Lock*, or either of them, had any thing or any interest or rent in or out of the said premises in the plea mentioned, or any of them, and before the making of the said indenture of &c., to wit, on the 1st of *April* 1830, the said *W. Furnival* being so as aforesaid interested in and possessed of the said premises in the plea in that behalf mentioned, made and erected certain salt-works, to wit, the said

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works in and upon the said premises in the plea mentioned, near and close to the said place where the said boat was so seized as aforesaid; and the said *W. F.*, to wit, then, for the purpose of enabling *all* (a) the subjects of this realm who should have occasion to purchase salt at the said salt-works, to fetch the same therefrom; and to receive the same there, and to carry the same away in boats, and for the purpose of enabling the tenants and occupiers of the said premises and salt-works to have the charge and loading of such boats, did make, dig, and cut the said cut or canal in the plea mentioned, near and close up to the said salt-works, and which said cut and canal communicated with a certain river or navigation, being a public high road; and the said *W. F.*, and the tenants and occupiers of the said premises and salt-works, always since the erection of the said salt-works, and the digging and making the said cut or canal, from time to time made and manufactured salt there, to wit, on the premises in the plea mentioned, and sold and disposed of the same there as an article of trade and merchandize, and delivered and supplied such salt so made to *all* (a) persons desirous of bringing and taking away the same in boats, at the said place in the said cut or canal where the said boat was when she was so seized as aforesaid, and such persons have always, during the time last aforesaid, taken away the same in their said boats along the said cut or canal: and the plaintiff further says, that shortly before the said time when &c., in the declaration mentioned, having occasion for salt for the purposes of his said manufacture, he did, in order to get salt for the purposes aforesaid, send and take his


(a) This word was inserted by consent, at the suggestion of the court, that it did not before appear, with sufficient certainty, that the manufacture and sale of the salt was a public trade, or that the salt was not made for the supply of particular firms only.

boat or vessel into the said cut or canal to the said salt works, to a part of the said cut or canal, being the place where salt so made on such premises as aforesaid was at that time usually sold and delivered by the tenants and occupiers of the said salt-works and premises to persons buying salt, and fetching and taking away the same in boats from the said salt-works: and the plaintiff says, that at the time of the seizing and taking and carrying away the said boat, as in the said declaration mentioned, the said boat was in the said cut or canal for a temporary purpose only, and for the benefit of trade and manufacture, to wit, for the purpose of obtaining, receiving, and taking the salt from the said salt-works, and the tenants and occupiers thereof as aforesaid, to be carried to the said manufactory and premises of the plaintiff, and there to be used in the said manufacture as aforesaid, and for the purposes of the plaintiff's trade and manufacture as aforesaid: and that the said boat had not then been or remained there, or upon any of the premises in the plea mentioned, for any long or unreasonable time in that behalf, for that purpose, or for any other purpose; and the plaintiff during all the time aforesaid was a stranger, and not privy to any of the parties or persons in the plea mentioned, or any or either of them, in estate or otherwise, and had not, during any of the times aforesaid, any notice or knowledge of the said deeds, rent-charges, or arrears of rents, or of any of them; and the said boat or vessel being in the said cut or canal for such temporary purpose as aforesaid, and for the benefit of trade and manufacture as aforesaid, the defendant, at the said time when &c., wrongfully committed the said trespasses &c. Verification.

General demurrer and joinder.

The point stated on the margin for argument on

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behalf of the defendant was, that under the circumstances disclosed in the replication the boat was not privileged from distress.

The demurrer was supported in *Easter* term by

*W. H. Watson* for the defendant. No circumstance here stated takes this case out of the general rule by which chattels locally present on premises subject to a rent-charge are liable to distress for arrears of it (a). For the exceptions to that rule are founded on the principle of public convenience, thus stated by *Dallas C. J.* in *Gilman v. Elton* (b):—"On the principle of public convenience, a rule has been adopted in favour of trade and commerce, and as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favour of trade and commerce." The exception has been clearly laid down (viz. in *Gisbourn v. Hurst* (c)), thus:—"Goods delivered to any person exercising a *public* trade or employment, to be *carried, wrought, or managed* in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent." Now, as the plaintiff sent his boat to the premises charged with these annuities, not to be "carried, wrought, or managed," but for his own private convenience, and in charge and control of his own servant, it was not exempt from distress while there. [*Alderson B.* A horse sent to a smith's shop to be shod is there for the private convenience of its owner.] But his protection while there is for the convenience of a public trade, viz. that of a farrier, who had a lien for his work at common law.

(a) See the cases collected in *Horsford v. Wright*, 5 Tyr. R. 410.

(b) 6 B. Moore, 243; 3 Br. & B. 80. S. C.

(c) Salk. 250. See Co. Lit. 47; *Francis v. Wyatt*, 3 Burr. 1498; *Blackstone's* argument in *Crosier v. Tomlinson*; *Gilbert on Distresses*, p. 40.



Now that right of lien will be found to co-exist in every instance with privilege from distress. In *Gisbourn v. Hurst* that privilege was allowed to goods delivered to a carrier, on the ground expressed, that his is a *public* trade, *i. e.* a trade necessary to be carried on for the public convenience. For the same reason goods landed and deposited at a wharf till they could be sold, have been held privileged from distress for arrears of rent due for the wharf; *Thompson v. Mashiter* (a). [*Parke* B. Cattle going to 'a public market are protected, though not delivered to be "carried, wrought, or managed;" *Fowkes v. Joyce* (b). Lord *Abinger* C. B. The point in all these cases seems to be whether the trade is of such a nature that it consists in receiving the goods of other persons on the premises, as in the cases of smiths, carriers, auctioneers, and wharfingers.] *Read v. Burley* (c) was a case which carries the argument further, resting it on the principle mentioned by Lord *Abinger*. There a clothier, who had left wool with a spinner to spin into yarn, came with a horse to take away the yarn. The spinner having no beam or weights to weigh it, went with the clothier into a neighbour's house, by his leave, in order to use his beam to weigh the yarn. While the horse and yarn were there, the landlord distrained them: but it was held, that he did so without right, on the ground that a clothier's trade is *pro bono publico*, and the weighing a necessary part of it. So again an auctioneer is only a factor of a peculiar kind, and his trade is a public one, so that goods sent to him for sale are privileged; *Adams v.*

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(a) 1 Bing. 283; 8 B. M. 260. S. C.

(b) 3 Lev. 260; 2 Vent. 50; 2 Lutw. 1161, S. C. As to this case, see 5 Tyr. 410, n.; 1 Tyr. 325, n.

(c) Cro. El. 549, 596; Noy's R. 68, S. C. Carefully stated from the different reports in 1 Tyr. 317, 323, 327, *Wood v. Clarke*.

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*Grane* (a). As to *Fowkes v. Joyce*, relief was given in equity on the ground of fraud, and the case itself is of doubtful authority. *Wood v. Clarke* (b) is strong in point for the defendant, for machinery delivered at a weaver's house, to be used by him in making up materials delivered to him at the same time, was there held distrainable. That was not a trade recognized to be public. Here the boat was only the vehicle or machine by which the salt was to be carried. [*Alderson* B. It need not have been left on the premises.] Nor was it in use when seized. [Lord *Abinger* C. B. The replication does not allege that it was merely brought on the premises for the purpose of loading.]

*Crompton* for the plaintiff, supported the replication. The argument of inconvenience to trade must here have weight, because the privilege claimed only exists in any case to prevent trade from being injured by the common law rights of distress. Now the greatest inconvenience must result in all the multifarious lines of trade and manufacture if those rights extend to such a case as this. In how few cases can vehicles carry home the articles produced by manufacture from raw materials, without coming on the manufacturer's premises, or, as here, into his private cut, waiting their turn to be loaded. The daily occurrence of carts and boats waiting at any coal warehouse, brewery, wharf, gas-work, &c. must illustrate this. This cut may be called a wharf, at which flats must wait to receive their burden in time. The flat is not an implement of trade, as the stocking frame was in *Wood v. Clarke*, but a mere vehicle whereby to fetch or carry the produce of the salt-works. [Lord *Abinger* C. B. Here it was not essential to the carrying on the trade of making or

(a) 3 Tyr. 528.

(b) 1 Tyr. 314.



selling salt, that the persons who wanted supplies of salt either to make alkali or for any other purposes should send their barges to the salt-works to fetch it; whereas a factor *ex vi termini* carries on his trade by taking in the goods of others. *Alderson* B. The plaintiff has not averred that it was necessary to the carrying on the trade of a salt-maker that the barges of customers should come on to his premises, and being there should remain a reasonable time in order to be loaded.] It is enough that this barge was on his premises by authority of law, for the general convenience of trade. The purchaser of the salt is here his own carrier; that will be taken to be very convenient if not necessary. The rules stated by Lord *Coke* in *Co. Lit.* 47 a, and *Blackstone* in his Commentaries, vol. iii. p. 8 (a), that “valuable things shall not be distrained for rent for benefit and maintenance of trade,” which by consequent are for the commonwealth, and are there by “authority of law;” do not mean that they must be on the premises of a trader compelled by law to take them in. Authority “in law” is only used in that place as contradistinguished to authority in fact, and refers only to the keeping an open place to which persons may legally come for purposes of trade, not by legal compulsion, but by such permission or invitation for purposes of trade, as amounts to a legal licence, so as to furnish an answer to an action of trespass. The cases put of a horse in a smith’s shop or hostelry, yarn in a weaver’s shop to be made into cloth, cloth at a tailor’s, &c. are mere instances by way of illustration and example, and goods placed on premises for the purposes of trade, may be there by authority of law, whether the trader, *e.g.* a factor, be compellable to receive them or not, or his trade on the contract be private or the

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(a) See 1 Tyr. 317, *Ward v. Clarke*, fully stated.

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contrary. In *Brown v. Shevill* (a) a beast had been sent to be slaughtered at a butcher's shop, and its carcass was held privileged from being distrained for the rent of the shop. [*Patteson* J. said a question is made, whether a butcher's trade is a public one. What is meant by public I do not understand. A common carrier and an innkeeper are bound to take in goods sent to them for the purposes of their trade. If that be the distinction pointed at, I can understand it. But a tailor is not obliged to take in cloth to be cut by him (b), so that I do not see how we can make such a distinction available for the purposes of the present question. *Alderson* B. Nor is a factor compellable to receive goods, or salt-works to take every customer.] *Read v. Burley* is the case which emancipated commerce in the course of its developement from the trammels of rules merely feudal, and adapted it to a state of things almost purely agricultural. It goes the full length of supporting the plaintiff's case; it is not averred there that it was necessary for carrying on a public trade, that the horse or yarn should be on the premises out of which the rent issued. *Walmesley* J. differed from the rest of the court, and held the horse distrainable, on the ground that the premises in respect of the rent of which the distress took place, were not a common beam or place for weighing, but private premises used for that purpose by consent of the owner; but he agreed that a house publicly used for weighing goods, a mill, an inn, a farrier's or tailor's shop, would be such "common places, and for the public weal," that a horse or goods sent there would be protected. By this is meant to be included any place

(a) 2 Ad. & El. 138; 4 N. & M. 277, S. C.

(b) See the old cases to the contrary cited in *Adams v. Crane*, 3 Tyr. 330, and 2 Ad. & Ell. 146.

where the party had a right to go by authority of law, *i. e.* by tacit permission or invitation of the occupier of the premises. Any such place would be common and open for the purpose of his argument. [Lord *Abinger* C. B. Long before that case occurred, every city, borough, and town had been compelled by the statute 8 *Hen.* 6. c. 5. to have a common balance and weights in the keeping of the mayor or constable for public use (*a*).] The three judges in *Read v. Burley* go the whole length of this case. The horse and yarn were there distrained for rent, not of the spinner's premises, where the wool had been made yarn, but of other premises, the landlord of which was wholly a stranger to the owner of the horse and the spinner of the yarn. And the distress was held improper, because the plea showed a privilege from it to be necessary to the convenience of trade, saying, "the cause of the bringing privilege them;" and *Owen J.* held the same doctrine, on the additional ground that they were always in the possession of him who brought them. [*Parke B.* An article may be said to be in the possession of a party if in his presence, and intended to be kept in his possession by such presence (*b*). But that ground of exemption from distress cannot here exist, no possession being averred.] *Hale* in his MS. notes on *Co. Lit.* 47 a(c), thus states *Read v. Burley*, "If *A.* brings yarn to his neighbour's house to weigh, it cannot be distrained there by the lord. *Noy*, n. 298, *Burley* and *Read*, Vid. 15, *E. Avowry*, 21 b:" thus showing that the privilege from distress is a general exemption in respect of the article being brought to the premises charged with the rent, for a temporary purpose connected with the trade.

(*a*) See 5 *Tyr.* 879.

(*b*) See 2 *East*, P. C. 683; 1 *Hawk.* P. C. c. 33. s. 2; *Rex v. Thomas*, *Carrington's Supplement*, 295.

(*c*) See *Harg. & Butler*, 46 b. note, 14.

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*Wood v. Clarke* is not in point, for it proceeded on the ground of the peculiar interest a workman has in his tools of trade, of which he is himself the owner. In *Francis v. Wyatt* (a) a carriage standing at a livery stable was held liable to distress for rent of the premises, because it was placed there, not for a temporary purpose, but for a permanency. That case does not show that privilege from distress can only be in respect of the publicity of a trade (b); but rather proceeded on the carriage being part of the profits of the premises. In *Gilman v. Elton* (c), A. Park J. says of *Read v. Burley*, that it is strong to show that it is the trade, not the individual which is favoured. This is in effect a wharf within *Thompson v. Mashiter*, being a place where goods are loaded or discharged on the banks of a cut or canal. In *Adams v. Grane* it was much pressed on argument, that it is not necessary for the purposes of trade that goods should be sent for sale to an auctioneer's premises; but Bayley B. put the privilege upon the broad ground of the benefit of trade in general. No landlord could give credit to the tenant of such works as these on the presumption that the boats waiting for salt were the tenants. The particular instances found in the text books and reports are mere illustrations of the general rule, which must not be limited to cases occurring in early stages of society. [Parke B. Were not the cattle privileged in *Fowkes v. Joyce*, on account of any place at which they might stop on their journey to market being accessory to that purpose? Had they been merely going from one estate of their owner to another and rested on the road, they would have been distrainable.] In *Fowkes v.*

(a) 3 Burr. 1498; 1 Bla. R. 483, S. C.

(b) And see Mr. J. Patteson's judgment, 2 Ad. & E. 145, and that of Williams J. Id. 147.

(c) 3 Br. & B. 83.

*Joyce* the permission to put the cattle in was given by the occupier. It is argued that compulsion to receive goods and right of lien go together; but a party has lien in many cases where he is not bound to receive (a). The old law that tailors were bound to receive cloth in order to make it up, is not now acknowledged. [*Parke* B. All the modern cases of factors, auctioneers, carcass-butchers, &c. were trades where it could not be contended that there was any duty to receive the goods.]

Lastly, though *Saffery v. Elgood* (b) overruled the old law as laid down in *Com. Dig.* tit. Distress (B 2), that the goods of a stranger can in no case be distrained for a rent-charge; can that law apply to a case like the present, where the flat distrained was on the premises by the permission and invitation of the very party who had granted the rent-charge?

*Watson* in reply. After actual possession of the vehicle was abandoned, no case shows that it was privileged from distress. No necessity to leave the flat in the cut in order to receive her cargo appears, nor is it averred that the usage and convenience of trade required it so to be left. The cargo might have been delivered into it by hand, or at the extremity of the premises. [*Parke* B. Since the amendment we are to take these premises as kept for sale of salt to all persons who came.] *Brown v. Shevill* is in the defendant's favour, for the butcher's business was slaughtering beasts sent him. Authority of law in the old report cited, meant compulsion of law, and had reference to the instances to which the right of lien was then confined. *Read v. Burley* went on the manual possession of the yarn by the owner, and on the horse being the vehicle for the

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(a) See *Brown v. Shevill*, 2 Ad. & E. 138. S. C. 4 N. & M. 277.

(b) 1 Ad. & El. 191.

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yarn. The party had there a lien on the yarn for weighing, so had the auctioneer on the goods sent to sale for lotting them, and the factor for advances; the only case of exemption from distress, where a lien does not exist, is that of beasts going to a public market, which rests on the regard paid at common law to a free transit to those places of public resort, and is therefore quite distinct from cases of delivery of goods to tradesmen. Nor is the right of distress altered, whether the goods are on the premises with or without the leave of the tenant. *Saffrey v. Elgood* decides the other point, no title paramount being here suggested.

*Cur. adv. m.*

The court having differed in opinion, the judges delivered their opinions *seriatim* in this term.

ALDERSON B.—The question raised upon the demurrer to the replication in this cause is, whether the boat stated to have been distrained for rent by the defendant, was by law distrainable under the circumstances disclosed in these pleadings. [His lordship stated the replication.]

The leading case on this subject is that of *Simmons v. Hartopp* (a), in which Lord Chief Justice Willes, in delivering the judgment of the court, goes very fully into the law on this point. He lays it down that there are five sorts of things which at common law were not distrainable.

First, Things annexed to the freehold.

Second, Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or employ.

(a) Willes Rep. 512.



Third, Cocks or sheaves of corn.

Fourth, Beasts of the plough and implements of husbandry.

Fifth, Instruments of a man's trade or profession.

The three first classes are absolutely free and exempt at common law, and the latter *sub modo*, in case there be no sufficient distress without them. There are, however, other exemptions not here enumerated ; first, chattels in actual use, or in the actual possession and presence of the owner himself, an exemption intended to prevent a breach of the peace ; and secondly, the instruments or vehicles of conveyance of goods privileged from distress, or brought to a public market or fair, there to be sold.

Now of the exemptions enumerated by Lord Chief Justice *Willes*, it is plain that only the second can be at all applicable to this case. We must first inquire, therefore, whether this boat is within that rule.

It is a chattel brought by the plaintiff to a place where, according to the pleadings, a public trade in salt is carried on, and is there left for the temporary purpose of being loaded with that article ; whilst it remains in that state, and before a reasonable time for so loading it has elapsed, it is distrained for rent due to the landlord of the premises wherein the trade in salt is carried on. Such are the facts of the case.

The boat is clearly not within the description of goods delivered to a trader to be carried or *wrought*, (*i. e.* worked up into another form,) in the way of his trade or employ ; for there is nothing to be done to it ; it is not brought to be repaired or altered in any way.

Then is it delivered to be *managed* in the way of the trade or employ of the person to whom it is so delivered ? In *Simpson v. Hartopp* the word “ managed ” appears to be used as synonymous with “ manufactured.” But

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that is too limited a sense of the expression; for courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a finished form as a manufacturer; and also to the dealing with the goods as articles of trade in their original or unwrought state as articles of commerce, as a factor. And the true principle seems to be, that when a person orders to the exercising such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered.

This is the reason assigned in *Simpson v. Harcourt* and in *Wood v. Clarke*. The principal ground was assigned by Lord *Lyndhurst* why the loom was not privileged was, that it was not necessary for the protection of the trade that such privilege should exist in that case. It is also it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling the salt. The trade may well be carried on at these salt-works without the possession of the boat being parted with at all by the owner. If he retains possession of it there is no doubt that it is privileged; but then it is for a totally different reason, viz. that the taking it would lead to a breach of the peace; and then the case falls within another exemption before pointed out. The instances for example in the books of the horse in the smith's shop, of the cloth sent to the tailor, of the materials sent to the weaver, of the goods sent to the factor, of the horse sent to the carcass-butcher, are all cases of goods delivered to be dealt with by the third person in

way of his trade, under circumstances in which his trade cannot be carried on at that place unless the goods are so delivered.

It is, however, proper to advert to the last of the two exemptions before pointed out, in addition to those mentioned by Lord C. J. *Willes*. That exemption is, where the thing distrained is the instrument of conveyance of goods which are themselves privileged, or which are brought to a public fair or market. And this is another instance of the same principle, viz. a protection for the benefit and convenience of trade. The article must be conveyed, and it is privileged from distress; therefore all things necessary for that purpose are privileged also. Thus, the horse or carriage conveying goods is so privileged; and also the basket or package in which they are enveloped, and the like. So again cattle going to or at a fair or market are privileged; and as a consequence arising out of the necessity for their refreshment on their passage towards such fair or market, if distant, they have been held to be privileged during any temporary agistment on the road (*a*). But these are all instances of a privilege arising as accessory to another privilege; and although we are not prepared to draw any distinction between the instrument of conveyance to, or that from the place where the privileged goods to be thereby carried, are situate, yet we think that the privilege is not to be extended to the conveyance sent for goods, which are not themselves privileged from distress. Now here it is abundantly clear that the salt which was to be conveyed by this boat was not itself privileged from the distress; for it was the property of *Furnival* himself, and was therefore, as his property, clearly liable to be distrained for the rent due from him to his landlord. Nor can this

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(*a*) 2 Saund. 290 *a*, note (7).

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case fall within the rule exempting the horse or carriage conveying, or which has conveyed goods to a fair or market. There the privilege arises out of the advantage derived to the public from the proper supply to that public place of resort and traffic. In *Fowkes v. Joyce (b)*, it was held, that cattle in their progress towards *London* were privileged; but the court appear to have proceeded on the ground that there was no solid distinction between the supply of a great city, and the supply of a fair or market. But I am not aware that a shop, carried on for the private profits of an individual, or that a horse bringing home goods from a fair or market, for the individual profit of the purchaser, has ever been held to be within this rule; nor can they, as I think, fairly be considered within the principles on which the rule appears to be founded. I do not think we can or ought to decide this case upon what may appear to be expedient. If we adopt such principles of decision, we shall deprive the law of one great advantage, viz., certainty; for that which appears expedient to one, may be, in the opinion of others, very inexpedient. If this argument were well founded, it would have undoubtedly prevailed in the case of the livery-stable-keeper, *Francis v. Wyatt*. But the court there adhered against their own views of expediency to the ancient decisions; and subsequent experience has shown that the so much dreaded consequences did not afterwards arise in practice.

Upon the whole, therefore, this case seems to me not to fall within any decided authority, nor within any of the principles upon which goods have hitherto been held privileged from distress; and that being so, I think that the replication is insufficient, and that the demurrer must be allowed.

(a) See *ante*, 1089, 1094.

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**BOLLAND B.**—The question for the opinion of the court in this case is raised upon a demurrer to the replication, and the point on which we are called upon to decide, is, whether the boat which has been taken as and for a distress for the arrears remaining unpaid of certain annuities and yearly sums mentioned in the plea of the defendant, was liable to be distrained.

It may be laid down as a general rule, that all goods that are found by a landlord on the premises demised to a tenant, are liable to be distrained by the landlord for rent due to him in respect of such premises, whether the goods be the property of his tenant or of a stranger, provided they are not privileged by law from distress. Lord Chief Justice *Willes* in *Simpson v. Har-topp* (a), a case that was twice argued and fully considered by the Court of Common Pleas, states, in delivering the judgment of the court, that there are five sorts of things which at common law were not distrainable.

First, Things annexed to the freehold.

Second, Things delivered to a person exercising a public trade to be carried, wrought, worked, or managed in the way of his trade or employ.

Third, Cocks and sheaves of corn.

Fourth, Beasts of the plough and implements of husbandry.

Fifth, The instruments of a man's trade or profession.

The three first sorts were absolutely free from distress, and could not be taken by the landlord though there were no other goods. The two last were only exempt *sub modo*, when there was distress enough without taking them. Let us then look to the circumstances under which the boat in question was taken, in

(a) *Willes*, 512.

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order to ascertain whether it can be legally brought within either of the five grounds of exemption.

The plaintiff contends that the boat was not liable to be distrained; because he says in his replication, that he is a manufacturer of, and a trader and dealer in alkalies, and that such manufacture is a manufacture of great public benefit; that great quantities of salt are required in the manufacturing such alkalies, and that he, as such manufacturer, requiring salt for the purpose of his manufacture, sent and took his said boat to the salt-works mentioned in this replication, and that at the time of the seizing and taking the said boat, it was at the said salt-works for a temporary purpose only, and for the benefit of trade and manufacture, viz. the purpose of obtaining, receiving, and taking salt from such salt-works to his manufactory, and that the boat did not remain on the premises for any unreasonable time.

It appears to me to be clear that the boat of the plaintiff cannot be said to come within either of the first, third, fourth, or fifth rules of exemption, nor can it, but by an over-strained and forced construction,—a construction that I do not think the court can adopt—be brought within the second rule of exemption. If this be correct, it follows then, that the non-liability to distress must rest upon some other foundation; and it has been contended at the bar, that it can be put upon the benefit to trade alone. I cannot, however, find any authority to support that position to the extent that is in this case contended for. Things used in the way of trade are under some circumstances not liable to distress:—a horse standing in a smith's shop to be shod, or in a common inn; cloth or garments in a tailor's shop; materials for cloth in a weaver's shop; corn or meal sent to the mill or market (a); goods delivered to

(a) Co. Lit. 47.

any person in the way of his trade, or to a carrier for hire, *Gisbourn v. Hurst* (a); but in each of these cases the privilege from distress is put on other grounds than the mere benefit of trade. The reported cases that come nearest to the present are those of the yarn carried to be weighed at a private beam, if in the way of trade, *Read v. Burley* (b), or of the horse that had carried corn to a mill to be ground, and during the grinding of the corn was tied to the mill door; in these cases the goods and the horse taken were held to be privileged from distress for rent; but the court, according to the reports, appears to have mainly proceeded upon the ground of the goods being under the personal care of their owner at the time of the taking (c). The boat in the present case had no such protection; it was left by the owner, and the privilege contended for is put, as attaching to the boat, upon the benefit to trade only. As, therefore, it does not appear to me that the boat comes within either of the five rules of exemption laid down in *Co. Litt.* 47 a. and pointed out by the court in *Simpson v. Hartopp*, and as the owner had, by leaving the boat, taken away that protection, which, in *Read v. Burley*, was thrown round the goods, and was the ground upon which the court held them privileged from distress, I am of opinion that the boat was legally distrained, and that judgment must be for the defendant.

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PARKE B.—The facts of this case, as they appear on the pleadings, and so far as they are necessary to be stated, in order to raise the point discussed before us, are these:—

On the lands out of which the annuity issued, the

(a) Salk. 250.

(b) Cro. El. 596.

(c) Noy, 68; Cro. El. 549; 1 Lord Raym. 386; 3 Burr. 1498; 1 Bla. R. 483.

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manufacture of salt was at the time of the seizure carried on, and the produce of the manufacture was sold generally, as an article of merchandize, to all persons who chose to buy it, and carry it away in boats. The plaintiff's boat was lying in a canal on the same lands, in the place where the salt was usually sold and delivered to customers, and for the purpose of receiving on board salt by him intended to be bought; and before the expiration of a reasonable time for that purpose, was distrained by the defendant. The fact that the plaintiff himself carried on a trade, and wanted the salt for the use of that trade, as alleged in the replication, I do not think it necessary to consider. It does not appear to me to give the boat a greater privilege, than if it were sent by a person other than a trader; although it is to be observed, that in one or two of the cases, some of the judges mention the trade of the owner of the chattel as material. *Read v. Burley (a)*.

The question then is, whether the boat was, under these circumstances, privileged from distress; is a point of some importance, for this is only one among many instances of a similar nature which may occur, and such would be the case of carts sent to be loaded at a wholesale warehouse, or at a land-sale colliery, or left in a brewery or distillery to be filled, and the like.

It is admitted on both sides, that there is no decisive case, which is expressly in favour of the privilege; on the other hand, that there is none expressly against it. In order therefore to decide the question, we must ascertain what the principle is on which the exemption is founded, as it is to be collected from the authorities, and decide according to that principle.

Upon consideration of these authorities, it is clear that the principle of the exemption is the public good, that is, that all men may freely and without inter-

(a) Cro. El. 596.



tion, or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me, that in order to give it full effect, we ought to hold that not merely all chattels are privileged from distress, which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt, which are necessarily placed there, in order to enable their owner to enjoy the full benefit of the trade or business, as it is there carried on. It is not, I think, because the chattels are to be worked upon on the lands so chargeable, though that is the most familiar case, but because they are necessarily placed on those lands, that the privilege is allowed by the law; and if goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them.

I proceed to show that this is clearly the principle on which the exemption is founded.

The proposition which is referred to in some of the cases as a rule, and is first laid down in *Gisbourn v. Hurst*, and adopted by Lord Chief Justice Willes in *Simpson v. Hartopp* (a) is, that “those goods are privileged which are delivered to any person exercising a *public* trade or employment to be *carried, wrought, or managed* in the way of his trade or employ.” This proposition although perfectly correct affirmatively, and quite comprehensive enough to include the cases then under consideration, is confessedly too narrow; for it does not include in it many cases, in which the privilege clearly obtains; as for instance goods sent to market, or a horse or vehicle sent with goods there, or sent to, or waiting for goods to be brought from the

(a) Willes, 514.

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place, where the trade or employment is carried on. The rule must therefore be couched in more comprehensive terms. I would observe, however, that the present case may possibly fall within this narrow definition, if the boat was delivered to, and to be kept by the trader; but I incline to think it is not sufficient averred in the replication, that the persons carrying the salt-works were to load the boat or to have possession of it, and therefore the boat cannot be said in any way delivered to the traders to be by "wrought or managed."

I may also observe with reference to one part of the proposition, that there appears to be no dispute (a) that the word "public" is to be understood to refer to every trade or employ, carried on generally for the benefit of any persons, who choose to avail themselves of it, as distinguished from a special employment for one or more particular individuals; although it has been held "public" in the sense, that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not—a predicament which is peculiar at this day to an innkeeper, or perhaps a carrier also; though *Holt* in 12 *Mod.* 484. considered it to belong to all trades which a man professed to carry on for all persons indiscriminately.

I shall now proceed to consider the authorities. The first is the *Year Book* 22 *Ed.* 4. 49. *Brian* who was chief justice seems to put the privilege from distress on the ground that the goods were with the trader by the authority of law: that is, that the trader was bound to receive them, and had a lien on them, a rule which would unquestionably be too limited at this time; indeed the chief justice was only citing the case

(a) See *Adams v. Grane*, 3 *Tyr. R.* 326; *Brown v. Shevill*, 2 *A. & E.* 146.

exemption from distress, to show that such chattels were not distrainable, however long they were left on the lands demised, on account of the obligation to receive, and the consequent lien. In the next case (a) the court say that "things in a common inn cannot be distrained, *for the prejudice it would cause to the common weal*, nor in a market or fair where things are taken to be bought."

Here the benefit to the public, from free communication and buying and selling, is clearly avowed to be the principle on which the exemption proceeds. So in the third case, which is in *Brooke's Abridgment*, tit. *Distress*, 251. pl. 70. which is as follows:—"Vide libro *Rastell* que stuffe misè ove tailor, fuller, shereman, weaver, miller, et hujusmodi ne seront distreine, car ceux artificers sont pour le common weale et eadem lex alibi de equo in communi hospitio." It then goes on to say that the artificers and innkeepers have both a lien on the goods.

The rule laid down, by *Co. Litt.* 47 a., is in these terms. After stating that a distress must be of things, whereof a valuable property is in somebody, he says valuable things shall not be distrained for rent, *for benefit and maintenance of trades*, which by consequent are for the *common wealth*, and are there by authority of law; as a horse in a smith's shop, shall not be distrained for the rent issuing out of the shop, nor the horse &c. in the hostry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, *nor in a market*, nor anything distrained for damage feasant, for it is in custody of the law; *and the like*.

This rule certainly does not confine the privilege to goods delivered to another to be *carried, wrought or managed* by him in the way of his trade. It states the principle of the exemption to be the common good for

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(a) 7 H. 7. s. 6.

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the maintenance of trades, and it then gives illustrations of that principle, many of which are cases of goods so delivered, but not all; for the horse in the hostry, and goods sent to a fair or market, are not so delivered. Lord Chief Baron *Gilbert* in his work on Distresses, p. 35. states the rule to be as follows: “Things sent to public places of trade, as cloth in a tailor’s shop, yarn in a weaver’s, a horse in a smith’s forge, and the like, are not distrainable; *for it is of public utility that the shops of traders should be privileged from the lord’s distress for his rent*; for otherwise no man could supply himself with the necessaries of life, without the danger of losing them for another’s debt, and therefore the landlord cannot distrain these things for the rent of the shop.”

Mr. Justice *Blackstone* in the 3d Book of his *Commentaries*, p. 7, adopts pretty nearly the same language of Lord Chief Justice *Gilbert*. “Valuable things in the way of trade shall not be liable to a distress, as a horse standing in a smith’s shop to be shod, or at a common inn, or cloth at a tailor’s house, or corn sent to a mill; for all these are protected and privileged for the benefit of trade, and are supposed in common presumption, not to belong to the owner of the house, but to his customers.”

The principle upon which the exemption is founded, appears therefore, I think, with great distinctness, from these authorities, to be the protection of trade, that is, not directly for the encouragement of the traders themselves, but in order that all the king’s subjects may freely enjoy the benefit of trading with them, and supply themselves with the necessaries and commodities of life; and where the expression is used that “goods are deposited *by authority of law*,” I take the meaning to be, that in case of trades which are public (in the sense in which I consider that term to be used) and of

public markets, the law gives authority to all, to bring those goods on the land in which such trade or market is carried on, by implication from the fact of its being so carried on for the use and benefit of all persons; and that the principle of the rule is public good, and the freedom of commerce, is recognized in several modern cases, among others that of *Gilman v. Elton* and *Thomson v. Mashiter*.

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If this be the principle of the rule of exemption, it seems to be inconsistent with the established mode of judicial decision, to lay down a rule which is to include one class of goods *only*, which fall within the mischief which the law is meant to remedy, and to exclude another equally within the same mischief; merely, because there is no case in which it has yet been held that such goods are privileged. A reference to the modern cases as well as the language of the text books themselves shows, that the early instances, those of innkeepers, smiths, tailors, fullers, weavers, and millers, are treated only as *examples* of the rule: not as has been observed by Mr. Justice *Park* and Mr. Justice *Richardson* in *Gilman v. Elton* (a), as limiting or comprehending the whole exception, but merely by way of illustration. And accordingly, the exemption has been allowed in cases within the same mischief, such as factors (b), wharfingers (c), auctioneers (d), and finally carcass butchers (e); in all which cases goods are *necessarily* placed in their hands; necessarily, I mean, in this sense, that they must be placed there, if the public who choose to become their customers, are to have the full benefit of those trades in the mode in which the traders choose to carry on their trade, and have held themselves out to the public as carrying it

(a) 3 Br. & Bing. 82.

(b) *Gilman v. Elton*, 3 B. & B. 75.

(c) *Thomson v. Mashiter*, 1 Bing. 283. (d) *Adams v. Grane*, 3 Tyr. 380.

(e) *Brown v. Shevill*, 2 Ad. & Ell. 146.

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on: for in most of the established instances of exemption, it is not a matter of *absolute* necessity, that the customer should deliver his goods into the hands of another. He might send for a tailor, smith, or weaver, or carcass butcher, to his own house—and he might sell his goods by auction, or otherwise, on his own premises; but if he wishes to employ the trader in the mode in which he carries on his trade, he cannot help placing the goods in his possession.

If, then, goods in the hands of such traders are exempt, when necessarily placed on the premises charged with the rent, in order to enable all persons to have the benefit of the trade there carried on by the working or managing the goods, and that for the good of the public, and on the principle, that it is to be protected, it seems to me that all goods ought equally to be exempt upon the same principle, when necessarily placed there in order to give all persons the benefit of such trade, though it may not be received in the same way. The ground of the exemption is not, that the goods are to be worked up or managed, but that they are necessarily placed on the premises of the trader, in the way of his trade; if that trade is to be made available to the public, what is to be done with them is immaterial.


In the present case, the carrying on of the trade in the mode in which the salt manufacturer held himself out as carrying it on, that is by selling salt to all who should send their boats to his works, necessarily required in order to enable the public to avail themselves of the trade, that they should send their boats there: and if so, it seems to me, that upon the principle of the protection of trade, for the benefit of the customers, the boats sent for that purpose were not liable to be distrained. If they were, it would follow that

the salt, if loaded on board, would be distrainable also, for no distinction could be made.


It is no objection in my mind, that the owner of the boat might possibly, if he had pleased, have brought himself within another exemption from distress, founded on an entirely different principle, by keeping the boat in the actual possession of himself or his servants, during the whole time it was placed on the premises charged with the rent. I can find no trace of authority for saying, that the privilege of exemption for the benefit of trade, has ever been limited to those cases, in which the owner of the chattel could not have done so ; on the contrary, in the case of the blacksmith, it is clear that the owner of the horse might have waited and kept watch, during the time that his horse was shod, and yet that is one of the established cases of exemption. In other acknowledged instances of exemption the same might have been done, though with more inconvenience. If a coat was delivered to a tailor to be mended, would the privilege depend upon the length of time which the repairs would require, and would it cease to exist, if the time was so short, that the owner might have conveniently waited?

I conceive that this circumstance makes no difference, and no where is it said that the privilege is confined to those cases, in which the owner could not have conveniently kept possession during the time that the chattel was deposited on the lands charged with the rent. The exemption was introduced for the freedom of trade, and the benefit of the community : and that principle requires that the goods should be protected when placed on the premises of a trader, without imposing on the owner the inconvenience of keeping a constant watch over them ; and I think, for the reasons above given, it applies to every case in which a chattel is necessarily brought on the premises of a trader, in

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order to enable the owner to enjoy the benefit of the trade.

I have before observed that there is no authority expressly deciding against the privilege as I have stated it, nor is there any which is even impliedly against it. The only modern case in which the privilege has been held not to exist was that of *Wood v. Clarke* (a), in which it was decided, that stocking frames sent with materials to a weaver were not exempt; for it was properly held that the fact of the frame and materials being sent together, made no difference; and that it was not necessary for the protection of trade, that the privilege should exist with respect to implements of trade, whether sent by the employer or hired or borrowed from another.

For these reasons I am of opinion that the plaintiff is entitled to our judgment.

LORD ABINGER C. B.—I agree with my brothers *Bolland* and *Alderson* that our judgment ought to be for the defendant. By the general rule of law all goods found upon premises of a tenant who is indebted to his landlord for rent are liable *primâ facie* to distress. That is the general rule. The courts of justice have engrafted upon that rule certain exceptions, and by these exceptions, when clearly established, we are bound. The question in this case is, whether this is one of those exceptions? Now it is not the exception of the goods being in the personal possession of the party to whom they belong; that is one of the exceptions, and is founded on a paramount rule that there shall be no exercise of any right, which is accompanied with the danger of breaking the public peace. In that respect the goods are protected; not only if they belong to a stranger, but if the tenant himself is riding

(a) 1 Tyr. R. 314.



a horse on his own premises, that is not the subject of distress, for the same reason. Another exception is, where the goods are going to, or perhaps coming from, a public fair or market, to which all mankind are invited, or supposed to go for the immediate purposes of their own traffic. A third exception, within which it is attempted to bring the present case, is where the trade is of such a nature as that the goods which are employed upon the premises are wrought or manufactured, or that something is done with them there. Now looking at every one of the cases in which that exception has been acknowledged or established, it will be found that the trade itself consists in dealing with other men's goods. Take the familiar example of the blacksmith's shop; the landlord there does not let to the blacksmith his shop that he may shoe his own horses only, but takes a rent from the man for exercising a trade which consists in shoeing other people's horses. If the landlord were allowed to distrain the horses sent to be shod in that shop, he would in fact be destroying the trade for which he was receiving rent. So in the case of a tailor; formerly the practice was not for tailors to furnish their customers with the goods themselves, but to receive the cloth, and work it up into garments; therefore a tailor was supposed to come within the rule, for his trade was understood to consist in working up other men's materials. So of the wharfinger whose trade consists in receiving and accepting, as a deposit, other men's goods, and not his own. So of a factor who has no goods of his own to carry on his trade, and whose trade therefore consists entirely in dealing with other men's goods. Now I cannot see that this case is similar to any one of these. This is the case of a boat being found upon the premises of the tenant; the boat is sent there for the

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purpose of receiving a cargo of salt, but the cargo not being ready, the boat is left on the premises, not in the possession of the plaintiff. Then it is like any other goods on the premises. The boat was not sent there for the purpose of being repaired, in which case I do not know that the principle would not extend to a boat builder under certain circumstances; neither did the trade which the tenant carried on consist in dealing with other men's boats or property; I do not agree that it was necessary to the trade that other men's boats should come there; nor do I see that if the cargo of salt had been shipped into the boat, and allowed to remain on the premises, not in the possession of the plaintiff, it would have been free from distress. If the cargo itself would not, why should the boat be? There is no case that I know of, in which the goods have been held to be liable to distress, where the carriage is exempt. Therefore in this case, as the salt itself was not exempted, so I say the boat was no more exempted; for the boat is but the adjunct and follows the same rule as the goods loaded in the boat may be bound by. It may be true that there might be more public convenience in the rule suggested by my brother *Parke* than in the other; I do not profess to have any opinion upon that subject, and I am afraid of trusting to my own judgment with regard to the public good, as a principle upon which we are to make rules or to engraft exceptions. I do not know whether the time may not come when the public good may require that all goods should be exempted from distress; it is not very long ago since I met with a suggestion made by an ingenious foreigner for settling disputes in Ireland; that suggestion was that every tenant should be declared to have an absolute right in the land he occupied (a);

(a) See Raumer's England in 1835, Vol. 3. p. 198.

and I have no doubt, that under certain influence, that might soon become a very popular opinion in Ireland. In a case perfectly new, to which the law furnishes no analogy, where the judges are called on first to establish a rule, we must, according to our own imperfect lights of public convenience, advert to it, for such is the nature of the law of England, and indeed of the law of all countries, that cases not provided for by the contemplation of the legislature must as they arise be determined by the good sense of the judges, in analogy, as far as they can, to the former cases; and if that analogy is not perfect, if it cannot be traced satisfactorily to the understanding, so as to find some principle established by decided cases or rules, which may meet the immediate case, then we are at liberty to consider which is the safest course to adopt for the public convenience, and must exercise our own limited judgment as to what may be most for the public convenience. It appears to me that this case does not fall within any one of the exceptions I have adverted to, and that there is no decided case analogous to it. Every one of the excepted cases is a case in which the trade is one that consists in dealings with other men's goods; that being the principle, it appears to me that I must agree with the other learned judges, that the judgment should be for the defendant.

Judgment for the defendant.

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Between

GEORGE HOOD, WILLIAM SHAW, THOMAS

TRAFFORD and HENRY WELCH . Plaintiffs,

and

JAMES PIMM and SAMUEL POTTER . Defendants.

By inden-  
ture between  
*E. P.* and  
*Isabel* his wife  
of the one part,  
and *W. T.* of  
the other part,  
*E. P.*, for set-  
tling certain  
hereditaments,  
did covenant  
with *W. T.*  
that he, *E. P.*,  
and his heirs,  
would stand  
and be seised  
of such heredi-  
taments to his,  
*E. P.*'s use for  
life, remainder  
to the use of  
the said *Isabel*  
for her life,  
with remainder  
(after limita-  
tions to the  
sons and  
daughters of  
the marriage,)  
to the use of

**T**HIS is a case directed by his Honor the Master of  
the Rolls for the opinion of this court. The facts  
were,

That by indenture of lease and release, dated the  
30th and 31st of *December* 1726, the release being  
made between *Edmund Parker* of the first part, *Gil-  
bert Cheshire*, the elder, and *Isabel Cheshire*, of the  
second part, and *Samuel Cheshire* and *John Leaper* of  
the third part, being the settlement executed previously  
to a marriage then intended between the said *Edmund  
Parker* and *Isabel Cheshire*; the freehold heredita-  
ments in question of which the said *Edmund Parker*  
was then seised in fee simple in possession, were, in  
consideration of such intended marriage, settled by him  
to the use of himself, the said *Edmund Parker*, for his  
life, with remainder to the use of trustees therein  
named, and their heirs, during his life, in trust to sup-  
port contingent remainders, with remainder to the use  
of the said *Isabel Cheshire*, his then intended wife, for  
the heirs and assigns of the said *Isabel*, the wife of the said *E. P.* for ever. There  
was no issue of the marriage. *Isabel* survived her husband, *E. P.*, and died about  
1782, having devised the property in question to *E. W.* In 1782 *E. W.* levied a  
fine thereof with proclamations, *sur conuzance de droit come ceo*, to enure to the use  
of herself in fee simple, and died seised twelve years after, having devised the  
property by will, dated *April* 1794. A contract was entered into by the plaintiffs  
and defendants for selling the property to the defendants, and the question was  
on *Isabel P.*'s right to devise, as having been seised in fee under the rule in *Shelly's*  
case, and whether *E. W.*, at the date of her will, was seised in fee of the property  
in question. The Court certified to the Master of the Rolls that she was, and  
*comm. semb.* without reference to the fine by *E. W.*

her life, with remainder to the use of the first and other sons of the said *Edmund Parker*, by the said *Isabel Cheshire*, successively in tail male, with remainder to the daughters of the said *Edmund Parker*, by the said *Isabel Cheshire*, as tenants in common in tail, with remainder to the use of the right heirs of the said *Edmund Parker* for ever. And in the said indenture of release and settlement was contained a proviso and declaration that, in case the said *Isabel Cheshire* should have no issue of her body to be begotten by the said *Edmund Parker*, or there being such, all of them should happen to die before they or any of them should attain the age of twenty-one years, or marry, then it should be lawful for the said *Isabel Cheshire*, at any time during her life, by any deed or writing to be by her executed in the presence of two or more credible witnesses, to charge all or any and every of the aforesaid premises with the payment of any sum or sums of money not exceeding in the whole the sum of 400*l.*, to such person or persons, and for such use and uses as she should think fit.


That the marriage between the said *Edmund Parker* and *Isabel Cheshire* was soon after solemnized.

That by an indenture dated the 13th day of *March* 1733, made between the said *Edmund Parker* and *Isabel*, his then wife, of the one part, and *William Turner* of the other part, it was witnessed that the said *Edmund Parker*, for settling the messuages and hereditaments thereafter mentioned according to his good liking and satisfaction, did covenant with the said *William Turner* that he, the said *Edmund Parker*, and his heirs would for ever thereafter stand and be seised of the hereditaments in question, and the reversion thereof to the use of the said *Edmund Parker* during his life, without impeachment of waste, with remainder to the use

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*of the said Isabel Parker for her life, with remainder to the use of the first and other sons of the said Edmund Parker by the said Isabel, his wife, in tail male, with remainder to the use of the daughters of the said marriage as tenants in common in tail, with remainder to the use of the heirs and assigns of the said Isabel, the wife of the said Edmund Parker, for ever.*

That there was no issue of the said marriage.

That the said *Edmund Parker* departed this life prior to the date of the next hereinafter mentioned deed poll, leaving the said *Isabel Parker*, then his widow, him surviving.

That by a deed poll under the hand and seal of the said *Isabel Parker*, dated 13th day of September 1765, after reciting the first-mentioned indenture of settlement, so far as respects the power thereby given to her to charge the said premises with the said sum of 400*l.*, and reciting that she had no issue by the said *Edmund Parker*, it was witnessed that she, the said *Isabel Parker*, being desirous to carry such power into execution, for divers causes and considerations, in pursuance of the power so given and reserved by the said therein recited indenture of release, and of all other powers and authorities to her in that behalf given or reserved, did, by such deed or writing by her executed in the presence of two credible witnesses, charge the premises in question (together with other hereditaments) with the payment of the said sum of 400*l.*; and did thereby appoint and direct the payment thereof to *Elizabeth Wolley*, of the said parish of *St. Werburg*, widow, who then lived with her, the said *Isabel Parker*, as a companion, her executors, administrators, and assigns, to be paid to her, the said *Elizabeth Wolley*, immediately upon her, the said *Isabel Parker*'s, death; and it was thereby provided, that if she, the said *Isabel Parker*,

should at any time during her life be desirous and minded to determine, and revoke and determine the said deed poll, and the charge and appointment by her thereby charged and appointed, it should be lawful for her from time to time, and at any time during her life, by any other deed or writing by her executed in the presence of two credible witnesses, to revoke and determine the same; and by the same deed or writing to charge all and every the aforesaid hereditaments with the payment of the said sum of 400*l.* to such person or persons, and for such use and uses as she should think fit.

That the said *Isabel Parker* did, in such manner as is by law required for the validity of devises of freehold estates, sign and publish her last will and testament in writing, bearing date the 6th day of *April* 1778, and thereby, after directing the payment of her just debts, and giving certain pecuniary legacies as therein mentioned, declared that as concerning the house she then lived in in *Derby* aforesaid, and all the buildings, orchards, gardens, hereditaments and appurtenances to the same belonging (being the premises in question) and all her real estate, that she had power to dispose of and could devise, and all her personal estate after payment of her debts, legacies, and funeral expenses, and subject thereto, she gave, devised, and bequeathed the same and every part thereof to the said *Elizabeth Wolley*, her heirs, executors, administrators, and assigns, and the said testatrix thereby appointed the said *Elizabeth Wolley* sole executrix of her said will.

That the said *Isabel Parker* afterwards died without having revoked or altered her said will, which on the 19th day of *February* 1782, was proved by the said *Elizabeth Wolley* in the diocesan court of the Bishop of *Litchfield* and *Coventry*.

That by an indenture dated 31st of *May* 1782, and made between the said *Elizabeth Wolley* of the one

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part, and *Thomas Eaton*, gentleman, of the other part: It was witnessed, that for settling and assuring the messuage, malthouse, lands, and hereditaments thereafter mentioned, to and upon the uses, intents, and purposes thereafter declared, and in consideration of 10s. to the said *Elizabeth Wolley* paid by the said *Thomas Eaton*, she, the said *Elizabeth Wolley*, did covenant with the said *Thomas Eaton* that she would, as of the then present *Hilary* or some other subsequent term, acknowledge and levy in due form of law, in his Majesty's Court of Common Pleas at *Westminster*, before his Majesty's justices of the same court, unto the said *Thomas Eaton*, and his heirs, one fine *sur conuzance de droit come ceo*, &c., with proclamations to be thereupon had of the premises in question, therefore the estate of the said *Edmund Parker*, then late in the possession of the said *Isabel Parker*, widow, deceased, and then of the said *Elizabeth Wolley*; and it was declared that the said fine should enure as to the premises to the use of the said *Elizabeth Wolley*, her heirs and assigns for ever.

That in *Trinity* term in the 22nd year of the reign of his late Majesty *George 3d*, a fine *sur conuzance de droit come ceo*, &c. with proclamations was levied of the same premises, pursuant to the said covenant, wherein the said *Thomas Eaton* was plaintiff, and the said *Elizabeth Wolley* was deforçant.

That the said *Elizabeth Wolley* signed and published her last will and testament, dated the 30th day of *April* 1794, to the effect therein mentioned.

That a contract had been entered into for the sale of the said hereditaments by the plaintiffs, the said *George Hood* and *John Welch*, deceased, and the defendant, the said *Samuel Potter*, to the defendant, the said *James Pimm*, and a bill has been filed in the High Court of Chancery by the said plaintiff, *George Hood*, and others, against the said *James Pimm* and *Samuel Potter*,



for a specific performance of the said contract, which cause is still pending, and the question for the opinion of the court is,

Whether the said *Elizabeth Wolley* was, at the date of her said will, seised in fee of the hereditaments hereinbefore, and the pleadings in the said cause mentioned to have been sold by the plaintiffs, *George Hood* and *John Welch*, deceased, and the defendant, *Samuel Potter*, to the defendant, *James Pimm*.

This case was argued in *Easter* term 1834 (a) before Lord *Lyndhurst* C. B., *Vaughan*, *Bollund*, and *Gurney* Bs. by

*Coote* for the plaintiffs. *Elizabeth Wolley*, at the date of her will, was seised in fee of the hereditaments sold by the plaintiffs, *Hood* and *Welch*, and the defendant, *Potter*, to the defendant, *Pimm*; first, under the deed of 13 *March* 1733, which is a covenant by *Edmund Parker*, the tenant in fee and settlor, to stand seised to the use of himself for life, with remainders to the use of his wife, *Isabel Parker*, for life, of his and her sons in tail male, of his and her daughters, as tenants in common in tail, with remainder to the use of the heirs and assigns of his wife *Isabel* for ever; and, secondly, under the fine levied by the said *Elizabeth Wolley*, to secure the possession she obtained under the will of *Isabel Parker*; which fine operated by non-claim.

As to the first point, the rule in *Shelley's* case applies, that where, in any instrument, an estate for life is given to the ancestor, and afterwards by the same instrument the inheritance is limited either mediately or immediately to his heirs, or the heirs of his body, as a class to take in succession as heirs to him, the word "heirs"


(a) 21 *April*. This case did not form part of the reports of that term on account of the certificate not having been sent to the Master of the Rolls for several terms after. It afterwards proved very difficult to obtain a copy.

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is a word of limitation, and not of purchase, and the ancestor takes the whole estate; that is, the estates coalesce in him as one estate of inheritance in possession, if the limitation be immediate, and remainder, if it is mediate (*a*). There is no exception to this rule; for the cases in which the estate of the ancestor has not coalesced with the prior estate of freehold, the ancestor, are cases in which the court has been enabled to consider the word "heirs" to have the meaning of "sons and daughters," or children of the body. Thus, where the limitation is to the wife for life, and her heirs in remainder, *after* a limitation to the ancestor's issue, the consideration which gives the estate to the wife, will extend to her heirs, so as to bring the case within the rule in *Shelly's* case. The peculiar consideration necessary to support this species of assurance sufficiently appears in the settlor's marriage. *Beckett's* case (*b*) is a leading decision to establish *Isabel's* claim to the fee. There the husband, in consideration of natural affection to his two sons, and for their advancement, to the intent that the tenements should continue in his name and blood, covenanted that he and his wife should stand seised thereof to the use of himself for life, and after his death to the use of *E.* his wife for life, and after their deaths in moieties to the use of his sons in tail. The estate to the wife was held good, on the ground that a limitation to a wife's use for life implied sufficient consideration in itself. Then does not such consideration, which on this assurance, will, without express words, carry a use to a wife, support and extend it to her heirs? *Goodtitle v. Pettoe* (*c*) is in the affirmative. There the question was, whether the pointee of a wife could take, she having power to appoint the fee in default of issue of the bodies of

(*a*) See *Shelly's* case, 1 Rep. 88; and Thomas's note, new edit. vol. 1.

(*b*) 7 Rep. 40 *b*; see Carter, 138, 146.

(*c*) Fitzgibbon, 299, 301; Stra. 934, S. C.

husband and herself. In that case, the covenant was by the husband to stand seised to the use of himself for life, remainder to his wife for life, and to the heirs of his body on her begotten; and in default of such heirs, then to the use of such person as the wife should appoint; and in default of such appointment to the use of *Thornton*, the lessor of the plaintiff, and his heirs; and *Raymond* C. J. in deciding against the validity of the appointment said, "if the use had been to the wife *and her heirs*, it would have been good, for it could not be said that the heirs of the wife were strangers to the consideration, for she bore all her heirs in herself, and that had (would have) served only to limit the use to her in fee." *Saunders*, in his work on Uses (*a*), cites the above passage, and refers to the other cases in 22 *Viner*, 194 to 204. [Lord *Lyndhurst* C. B. The limitation supposed by Lord *Raymond* would have been a direct and express conveyance of the fee to the wife; whereas this is a fee by construction of law, which is the same as if it had been so expressed in the ordinary terms.] As to the second point, *Elizabeth Wolley* obtained the fee by possession for twelve years after fine and non-claim (*b*).

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*Wigram* for the defendants. As to the second point, as *Elizabeth Wolley* took nothing but under the will of *Isabel Parker*, if the latter had no right to devise in fee, *Elizabeth Wolley* could not pass more than she took, and *partes finis nihil habuerunt*.

But on the main point. The rule in *Shelly's* case consists with the defendants' case. For, if an estate is limited to one for life, with remainders over, and ultimate remainders to the heirs of the tenant for life, so that if the rule did not prevail, the heirs of the tenant for life

(*a*) 4 edit. vol. 2, p. 81.

(*b*) As to this possession, see *Doe d. Burrell v. Perkins*, 3 M. & S. 271; *Watkins on Conveyancing*, 7th ed. 25; Co. Lit. 57; 2 Leon. 47, 147.

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would take by purchase, the rule would give to ancestor that estate which the author of the deed will intended should be given to the heirs of the tenant for life by purchase; the effect of the rule being to give an estate, which the party would not otherwise take, independently of the rule, but to convert his estate from an estate by purchase, into an estate by inheritance from the ancestor. [Lord *Lyndhurst* C. B. estates coalesce and enlarge the original estate. there be here two separate estates by purchase, one for life in the ancestor, and the other in remainder in the heir?] If you exclude the fact that *Isabel Parker* took an estate of freehold (or make any other supposition as to take this out of *Shelly's* case) the heirs could have that estate by purchase, in which the operation of the rule originates, viz. where the ancestor takes an estate of freehold. The special reason for the decision in the case put in *Goodtitle v. Pettoe* is, that the ancestor has all the heirs within her. [Lord *Lyndhurst* C. B. there takes the fee wholly to herself.] This ultimate limitation, though good by way of lease and release, would be bad in the shape of a covenant to stand seised. Suppose *Isabel Parker* to have had children living at the date of her will, she would have taken the estate; nothing shows that the ultimate heirs of *Isabel Parker* would necessarily be in such kindred as to come within the relationship which forms the consideration of a covenant to stand seised. They might or might not. Then this court will not wait the result, but will declare the ultimate limitation void, on account of generality; the more particularly as the deed does not express that the ultimate heirs shall be within the consideration of the deed as a class. The assurance by covenant to stand seised is now disused, for it was usual to give the first covenantee an estate for life, with a power of leasing by appointment; and it was said that if the appointee was within the degree of relationship


ship which supported the consideration, the lease would be good; but that was universally denied by the courts of law (a). The estates which are in the first instance separate, are united by the arbitrary rule of construction introduced by *Shelly's* case, not in furtherance of the ancestor's intention, but at the expense of it, where the heir would otherwise take as a purchaser. But the wife's heirs could not so take in this case. The courts exclude the rule from their consideration, while deliberating what the settlor intended by the deed. [Lord *Lyndhurst* C. B. The rule says, that the heir shall take by descent; and it vests the whole estate in the first party who has an estate of freehold. The consideration required in order to give the fee to the wife, existed in this case. You say that the heirs could not take as purchasers, because they took in another right, and that on that account the necessity for the construction adopted in *Shelly's* case could not exist.] Before the courts apply the rule in *Shelly's* case to unite estates till then separate, they require proof that the estate given to the heirs, if duly created by a proper assurance, would pass to them as an estate by purchase,—a result which they hold to be so inconvenient as to require that intention to yield to a contrary rule of law. But as that rule never supplies or creates an estate at all, and only operates on such an estate as it finds created in such a manner as to be obnoxious to its provisions, it could not apply in this case: for no estate in remainder here exists, the assurance used not having the requisite operation. Where an estate for years is granted, with ultimate remainder to the heirs of the grantor, his intention prevails; then if of two limitations, one is legal, and the other equitable, the intention that heirs shall take as purchasers will not be sacrificed

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(a) See Gilbert on Uses, 3d edit. 94, 419, 422; 2 Saunders on Uses, 4th edit. 83, n.; Sugden's Powers, 3d edit. 122; 22 Vin. Abr. 203, pl. 5, 6; *Smith v. Rigley*, Cro. Car. 529.

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by the law. The words of limitation in remainder be the same, whether the first estate limited be for years only, or for life, and so a freehold; and the intention of the settlor cannot be held other than the same in all cases. But in the latter case, the courts considering the intention as sacrificed to the arbitrary rule, apply the rule by giving the estate to no other persons than those who would otherwise take, though in a different manner. Thus, Mr. *Hargrave's* reasoning in his *Law Tracts*, is in point. He argues that this rule can no longer be treated as a medium, either for finding out or assisting to execute intention. On the contrary, he says, "the rule supposes the settlor's intention to be already ascertained, and to be, that the gift or conveyance in question has first given to some person an estate of freehold, and has then superadded a succession to the heirs general or special of that same person, by making him or his the ancestor, terminus, or stirps, by reference to which the whole generation and posterity of heirs is to be accounted. Whether the conveyance has or has not so constituted an estate of freehold with a succession engrafted on it, is a previous question, which ought to be adjusted before the rule is thought of. To resolve that point, is not the office of the rule in *Shelly's* case, nor from its nature can it contribute any assistance whatever." Mr. *Hargrave's* doctrine is approved by Mr. *Fearne* (a). [Lord *Lyndhurst* C. B. Here the limitation uses the word *heirs* in its ordinary sense, and you say they would not have taken as purchasers.] In *Jones v. Morgan* (b) Lord *Thurlow* says that a testator always means the first estate to be for life. [Lord *Lyndhurst* C. B. In these cases that is never questioned, the real point here being, whether by using the w

(a) *Contingent Remainders*, 7th edit. 188—191.

(b) 1 *Brown's Ch. Cas.* 220.

“heirs” in the ultimate limitation, the covenantor did not mean heirs in tail in the ordinary sense. Does any case go beyond the inquiry what is meant by the ultimate limitation to *heirs*?] The sole origin of the rule in *Shelly's* case, as traced by every writer, is the inconvenience of the heir taking as purchaser; see *Hargrave's Law Tracts*, 556; *Fearne*, 7th edit. 83, 86, 87; 1 *Preston on Estates*, 271. The rule as laid down in 2 *Rol. Abr.* tit. Remainder (G), pl. 5. H. pl. 3. is accurately translated in the note in 2 *Doug.* 507. and adopted by *Fearne*, 7th edit. p. 29, who, after quoting the passage from *Rol. Abr.* says, that “whenever the ancestor, by any gift or conveyance, takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance.” All these authorities illustrate the effect of the rule in *Shelly's* case, as soon as it has undoubtedly applied. Supposing a life estate to have been here limited, and any son to have lived, so as to have an estate tail existing in him, the rule in *Shelly's* case would have transferred to the ancestor, by way of remainder, that estate which was given to his heirs by the deed. Suppose the remainder to A. and his heirs to be void for any reason, or that the law was, that after a limitation of an estate for life, or of inheritance in tail, there could be no other limitation at all, would the rule in *Shelly's* case give effect to an ultimate limitation of the kind held to be invalid, or make it unite with the previous estate, which co-existed in a separate shape, according to its limitation in the first instance? The definitions of *Rolle* and *Fearne* show that these are not words of limitation of the estate, as contended on the

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other side, and that the rule in *Shelly's* case only transferred one of two separate estates to the other. All matters were reconciled by the consideration suggested by *Preston*, viz. that one party relies on cases in which the rule in *Shelly's* case is yet to be applied, and the other on the effect of that rule after its application in fact. He also cited *Fearne*, 30. *Touchstone*, 238. It is said these are called "words of inheritance" in *Shelly's* case, but that means that they are so by operation of the rule *when* applied. The circumstance that there was no issue of the marriage, makes no difference. [Lord *Lyndhurst* assented.] The estate limited would be valid, independently of the rule, before it could be operated on by it.

Coote in reply. Covenants to stand seised do not become inconvenient assurances, as powers of appointment cannot be introduced with effect. [Lord *Lyndhurst* assented.] C. B. It is admitted, that if the words "heirs and assigns" of *Isabel Parker* are words of limitation, the consequence follows that there was a good consideration, and you must succeed. The argument on the other side is, that the rule in *Shelly's* case having been adopted to get rid of an inconvenience, viz. of land not taking by purchase, it cannot apply till that inconvenience be shown to exist, so as to make its application necessary. To make out that no such inconvenience existed in this case, it is said that those persons designated as "heirs," would not take as heirs, being remote in blood from the covenantor; but that if they did take, taking in the first instance by purchase, and not by descent, there would not be the legal consideration for the grant. That is the objection, and it is of ingenuity.] On the second point, *Hulme v. Bingley* (a) is in point.

Cur. adv. vult.

(a) Cro. Car. 200.

The following certificate was afterwards sent to the Master of the Rolls:—

“ We have heard the above case argued, and are of opinion that the said *Elizabeth Wolley* was, at the date of her said will, seised in fee of the hereditaments referred to in the foregoing question.

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As to this case, see p. 1123. note.

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CASE by a reversioner for an injury to a wall in the possession of his tenant. Pleas: first, not guilty; secondly, that the defendant had a right to a drain under the wall, and broke &c. the wall in order to clean the drain. Replication, that the defendant had no such right. The cause had been entered for trial at the *Merionethshire* summer assizes in 1834, but *Vaughan J.* having refused to amend, the record was withdrawn. By a subsequent order of a judge the replication was amended by striking out the traverse of the right, and new assigning excess, on the terms of the plaintiff's paying the costs of amendment, and the defendant's costs of the day, and of the defendant's having liberty to withdraw the second and fourth pleas, which put in issue the plaintiff's interest in the premises, and the

In case by a reversioner for breaking a wall, the defendant pleaded not guilty, and justified under a right to a drain, and to break the wall to clean it. The plaintiff traversed the right in the replication, but afterwards withdrew the traverse and new assigned excess. Defendant thereupon pleaded not guilty to the new assignment, but afterwards

withdrew that plea, and also so much of his original plea of not guilty as applied to that part of the declaration covered by the new assignment, paying into court 10*l.*, which the plaintiff took out of court in “satisfaction of the damages for which the action was brought:”—Held, that the plaintiff was entitled to the costs of the writ, and of the new assignment and subsequent proceedings, but that the defendant was entitled to the other costs and to the general costs of the cause.

Semble, the plaintiff would have been entitled to some part of the costs of the declaration could it have been ascertained.

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injury done by the defendant. The defendant pleaded not guilty to the new assignment, and the plaintiff gave notice of trial. A judge's order was then obtained against the defendant for withdrawing his plea of not guilty to the new assignment, and so much of his original plea of not guilty as applied to that part of the declaration was struck out, and for paying 10*l.* into court in satisfaction of damages on the new assignment. The plaintiff took this order out of court "in satisfaction of the damages for which the action was brought;" and the master, in taxing the costs, gave the plaintiff the costs of the writ incurred since the new assignment, but awarded the general costs not disposed of by the judge's order between the writ and the new assignment. A rule having been obtained for reviewing the taxation, on the ground that the plaintiff, by having succeeded, became entitled to the general costs of the cause,

Sir *William Follett* showed cause. The defendant must have succeeded at the trial, had not the amendment been permitted, for the justification was pleaded to the whole, and the replication traversed only. Now the defendant's success after judgment by default on the new assignment, entitled him to the general costs of the cause (*a*). [*Alderson B.* was so entitled because he succeeded at the trial.] The payment of money into court on the new assignment in this case is tantamount to the defendant's having suffered judgment by default on it, and the plaintiff by taking it out admitted it sufficient to cover the whole injury sustained. Then the master was right in his taxation; for he has allowed the plaintiff those costs which are consequent on the existence of a cause of action to the amount of 10*l.* paid into court on the new assignment. He mentioned *Rudolph*

(*a*) 1 Saund. by Williams, 300 *f. n.*

v. Smith (a), Cross v. Johnson (b), and Booth v. Ibbotson (c).

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Jervis supported the rule. The plaintiff is entitled to the general costs, for the new assignment must now be taken as if it had originally stood on the record, and the defendant is wrong by his own admission. Though, by taking the 10% out of court, the plaintiff admits that the pleas cannot be denied, the defendant is in error, for the new assignment was only occasioned by his mistaking the plaintiff's complaint. The plaintiff must have had the general costs at the trial, had not the defendant withdrawn so much of the plea of not guilty as applied to that part of the declaration which was covered by the new assignment, for the plaintiff would have been forced to trial by the pleadings. Then having succeeded on what was in truth the wrong complained of, the plaintiff is on that account entitled to the general costs; at all events to the costs of that part of the declaration repeated in the new assignment.

LORD ABINGER C. B.—The question is, whether the defendant's payment of money into court on withdrawing his plea to the new assignment, and so much of the plea as applied to that part of the declaration, and the plaintiff's taking it out in satisfaction of all damages sustained, is or is not equivalent to a judgment by default to the new assignment. I am of opinion that it is so equivalent; then the defendant is entitled to the general costs, as he has entirely succeeded, except as to the 10%; and the plaintiff is entitled to the costs of the writ, as well as of the new assignment, and of all costs subsequent to it.

(a) 1 Dowl. R. 467. (b) 9 B. & Cr. 613. (c) 1 Y. & J. 354.

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ALDERSON B.—The test is, that taking the new assignment to be part of the declaration, the plaintiff received costs as to the latter part of it. His success in the action also entitled him to receive the costs of the writ and the new assignment, with those resulting from the latter. But as the defendant pleaded to the declaration with success, he is entitled to the other costs. Perhaps the plaintiff should have been allowed a small part of the costs of the declaration, could a proper proportion have been ascertained without great difficulty.

The other barons concurred.

Rule discharged.

See *Staley v. Long*, 3 Bing. N. C. 781.

RETALICK *against* HAWKES.

Where a plaintiff avers by way of special damage to him by the defendant's breach of agreement, that he the plaintiff has sustained certain expenses, he need not furnish particulars of the special damage.

ASSUMPSIT to recover damages for not complying with an agreement by the defendant to assign certain leasehold premises to the plaintiff. The special damage was the being compelled to pay money for procuring the conveyance.

John Evans moved for a rule calling on the plaintiff to furnish particulars of it. The cause of the defendant's default in assigning the premises as agreed was, that the lessor had refused him a licence to do so, and the defendant wished to pay the amount of the plaintiff's attorney's bill into court, that being the special damage which had accrued. [Lord Abinger C. B. The plaintiff will still go on to recover the liquidated damages.] Under 3 & 4 W. 4. c. 42. s. 1, money may be paid into court to cover all the damages.

Lord ABINGER C. B.—I am of opinion that this court has no power to compel the plaintiff to furnish the particulars.

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BOLLAND, ALDERSON, and GURNEY, Bs. concurred

Rule refused.

WARD *against* PEEL.

THE issue herein was delivered in the usual form as to be tried at nisi prius; but a judge's order was afterwards obtained for trying it before the sheriff under a writ of trial. Notice of trial was given, and the order served on the defendant. A rule was obtained to set aside the issue with the service of the order and notice of trial, for irregularity.

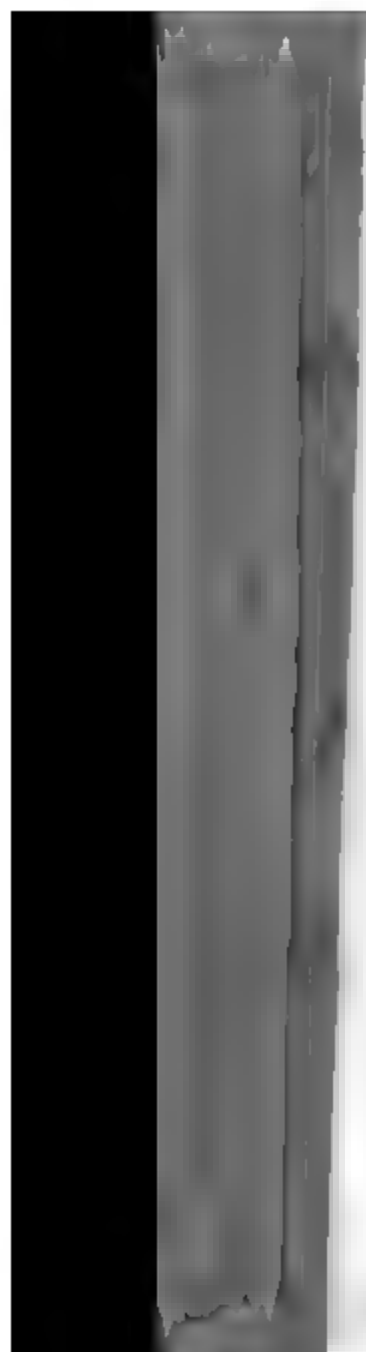
An issue was delivered framed as for a trial at nisi prius, and the plaintiff afterwards got an order for trial before the sheriff, without taking out a summons to amend the form of issue, and served the order on the defendant with notice of trial: Held, that the issue, service of the order, and notice of trial should be set aside for the irregularity, in the issue not having been made up or amended in the form of an issue to be tried before the sheriff. (3 & 4 W. 4. c. 42. s. 17.)

Busby showed cause. Nothing in sect. 17 of 3 & 4 Will. 4. c. 42. prevents an issue being delivered before obtaining a judge's order for trying a cause before the sheriff; and if so, in what other form but that of an issue to be tried at nisi prius can it be drawn? at all events, the service of the judge's order was regular, so that the rule is too large.

Lord ABINGER C. B.—The plain meaning of the act is, that issues to be tried before a sheriff must be made up in the form provided, as adapted to that mode of trial. An issue delivered before the judge's order is obtained, should have been amended on summons. The service of the judge's order here insisted on could be of no use under the circumstances.

The other barons concurring,

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AN

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The defendant having reasonable and probable cause for thinking that the plaintiff was a party to an attempt to rob him, went for a constable, who on seeing the plaintiff, told the defendant he was a respectable man, and that he (the constable) would be answerable for his appearance to answer the charge. The defendant, however, insisted on the constable taking the plaintiff into custody, and on the following day preferred a charge against him before a magistrate, which was dismissed.

In an action by the plaintiff against the defendant, for maliciously, and without probable cause,

making such charge before the magistrate, the judge told the jury that the defendant had reasonable and probable cause in the first instance, but that on the representation made by the constable, such reasonable and probable cause ceased, and that if the jury were of opinion that the defendant ought to have been, and was, in fact, satisfied of the plaintiff's innocence, but persisted in the charge from obstinacy or wounded pride, they ought to find their verdict for the plaintiff.

Held, that this was a misdirection; for, inasmuch as the facts remained unaltered, the reasonable and probable cause which they afforded was not taken away by the representation of character made by the constable. *Musgrove v. Newell*, T. 1836. 557

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An affidavit cannot be impugned for being sworn before the attorney in the cause, unless it appears that he was such attorney at the time the affidavit was sworn; and it is not enough that he was at that time "one of the attorneys" to the defendant in the cause. (*Reg. Gen. Hil. 2 IV. 4. s. 6.*) *Beaumont v. Dean*, M. 1835. 209

Affidavit is bad on which the name of a plaintiff suing as assignee is described in the title thus: "*J. C., assignee, &c.*" *Casley, assignee, v. Smythe*, M. 1835. 219

The court will not allow a party to show cause against a rule nisi unless he has obtained office copies of the affidavits on which it was obtained, or at least given an undertaking that they shall be procured, for the fees payable in respect of them are now public property. *Westmorland v. Pike*, M. 1835. 22

Where the master reported that part of an affidavit, on which a rule had been obtained, had been added to the affidavit after it was sworn, the court refused to discharge the rule with costs, to be paid by the defendant, but only suffered that part of the affidavit which had been sworn to be used. *Semble*, that a special application for costs, to be paid by the attorney, would have been successful. *Wright v. Skinner*, E. 1836. 59

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A rule nisi had been obtained to s

aside a judgment signed upon a cognovit given by the defendant, on the ground that such cognovit had been given upon an agreement with the defendant personally, which had not been fulfilled. On showing cause the rule was discharged, the affidavit on which it was obtained having been made by the defendant's attorney, and not, as it ought to have been, by the defendant himself. *Preedy and another v. Lovell*, E. 1836. 847

The affidavit of the existence of the debt required to obtain a *sci. fa.* to revive a judgment more than ten years old, ought, if not made by the plaintiff, to be made by the person who was his attorney when the judgment was obtained. An affidavit, which merely stated that the deponent was, and still is, the plaintiff's attorney, was held insufficient, but the defect was subsequently allowed to be supplied by the agent in *London* swearing that the attorney was the plaintiff's attorney at the time of the judgment. *Norfolk (Duke of) v. Leicester*, M. 1836. 249

A party who has obtained a rule nisi on an affidavit defective for want of the names of the deponents in the jurat, cannot, on cause shown, support his rule by a fresh affidavit, but the court will enlarge the time in order to the filing a fresh affidavit. *Goodricke and another v. Turley and others*, M. 1835. 146

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tion by an indorsee of a bill of exchange, against the drawer (or indorser), must state a default of payment by the acceptor. *Crosby and another v. Clarke, a prisoner*, E. 1836. 660

Meaning of word *indebted* in. 662, n.

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An affidavit of debt was sworn in *Ireland* before a commissioner of the Common Pleas and Exchequer: Held, that the title of the court need not be prefixed to the affidavit at the time it is sworn, but that the affidavit might be taken before such commissioner, and afterwards entitled and used in either court. *Perse v. Browning*, E. 1836. 864

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In an action by the executor of an innkeeper against the chairman of the committee of a candidate at a contested election, for refreshments supplied to voters, but which were directly ordered by a third person, one *M.*: Held, that before the plaintiff could recover, he was bound to prove that *M.* was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant in so employing *M.* was not acting as agent for any other person, or else that *M.* was not a

mere agent, but acted jointly with the defendant, or with the defendant and others; and that it would make no difference that the plaintiff's testatrix considered *M.* as authorized to contract on behalf of the candidate, if the fact was not so. *Thomas, executor, v. Edwards*, E. 1836. 872

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APPEARANCE.

The plaintiff having appeared for the defendant under the statute, and afterwards gone on to final judgment, a rule to set aside such appearance and all subsequent proceedings, for irregularity, on the ground that the defendant was a minor, was made absolute without costs to either party. *Nunn v. Curtis, the younger*, H. 1836. 500

On showing cause against the rule it appeared that the application was by the father of the defendant, and that the latter was not privy to it. The court held that there ought to have been an affidavit that the application was at the desire of the defendant, but adjourned the case in order that such an affidavit might be produced. *Ib.*

A defendant having entered an irregular appearance, instead of amending it entered a new one, of which he gave notice to the plaintiff, and demanded a declaration, and afterwards signed judgment of non-pros on account of the plaintiff not declaring in due time:—The court set aside the non-pros, hold-

ing that the defendant should be applied to amend his original appearance. *Bate v. Botten*, M. 1836. 1

The defendant was arrested for 32*l.* 6*d.*, the amount of a bill of exchange, but the sum indorsed on the capias was 39*l.* 3*s.* 6*d.*, which was made up of the 32*l.* 6*d.*, and 7*s.* interest, and of a sum of 16*s.* the amount of a chose in action, which the plaintiffs could recover in their own names. The defendant took out a summons to stay proceedings on the payment into court of 32*l.* 6*d.* The plaintiffs refused to accept that sum, saying that more was due; whereupon the judge, before whom the summons was heard, made an order dated the 4th of November, that the defendant should be at liberty to pay the sum refused into court, and if the plaintiffs should receive no more they should not be entitled to costs from that time. On the following day the defendant's attorney wrote to the attorney for the plaintiffs, saying, that he had entered an appearance, and would accept a declaration, if the latter thought it right to continue proceedings on the face of the order. On the 12th the defendant's attorney wrote again, announcing, that having received no reply he had paid the money into court. On the 9th of January the plaintiffs' attorney declared conditionally until special bail was put in and perfected. The rule having been obtained to set aside the declaration for irregularity, and stay all further proceedings on payment of the plaintiffs' costs prior to the date of the judge's order: Held, first, that the plaintiffs were entitled to interest on the bill of exchange; secondly, that the plaintiffs must treat the appearance entered by the defendant as a nullity, and declare conditionally until special

was put in. And the court discharged the rule, with costs, unless the defendant should elect to pay the interest and the costs of the action up to that time; and in the event of his so electing, the rule to be absolute upon those conditions. *White and others v. Cobham*, H. 1836. 507

See IRREGULARITY.

ARBITRATOR AND AWARD.

Semble, that the court may, under the 3 & 4 Will. 4. c. 42. s. 39., enlarge the time for an arbitrator [to make his award, whether his authority has been revoked or not, and although the order of reference contains no promise to enlarge the original term. *Potter v. Newman*, M. 1835. 29

Two arbitrators were chosen in pursuance of a clause in a deed which directed that they should appoint an umpire before they commenced proceedings. They met, but could not agree upon an umpire, whereupon the plaintiff revoked his arbitrator's authority.

Held, that the case was not within the 3 & 4 Will. 4. c. 42. s. 39., which applies only when there is a complete reference. *Bright v. Durnell*, H. 1836. 576

An arbitrator appointed under an order of *nisi prius*, had power to enlarge the time for making his award, but no special mode of making such enlargement was pointed out. Two days before the time expired, he appointed another meeting on a subsequent day, in the presence of both parties, to which neither side objected. Held, that this amounted to a due enlargement of the time.

Where a nominal verdict is taken subject to a reference, in which the verdict is ultimately to depend

upon the award, the court cannot make use of such nominal verdict against the opposite party, by allowing judgment to be entered upon it. *Burley v. Stevens et ux.* H. 1836. 413

An action and all matters in difference between the parties, were referred to arbitration. The arbitrator awarded that the plaintiff had no cause of action in the suit, and directed him to pay to the defendant the costs of the action. He further awarded, that the defendant should pay the plaintiff a certain sum in respect of a claim unconnected with the action:—Held, on an application to set off the sum awarded to the plaintiff against the defendant's costs of the action, that this could only be done subject to the lien of the defendant's attorney for his costs. *Cadle v. Smart*, H. 1836. 475

Under an order of reference of a cause, and all matters in difference between the parties, the costs of the suit and of the reference and award, and all other costs, were to abide the event, and final judgment was to be entered up for the plaintiff or the defendant, according to the award. The arbitrator awarded that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay to the defendant a certain sum, which he found to be due from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from receiving the commission to which he would be entitled under a certain agreement:—Held, that the arbitrator had no power to direct in which way the verdict was to be entered, but only to decide whether the plaintiff had a right of action against the defendant;—and a rule to set aside the award was refused. *Harding v. Forshaw*, H. 1836. 472

An action of trespass *quare clausum fregit*, to which the defendant pleaded a justification under a public right of way, was referred, with power for the arbitrator to direct what should be done between the parties. He directed a verdict to be entered for the defendant, and that the plaintiff should put up a stile, and place a bridge at a certain spot on the footpath in question. The place where the stile and bridge were to be erected was not on land either of the plaintiff or the defendant, but of third parties:—Held, that so much of the award as directed those acts to be done, was void. *Turner v. Swainston*, T. 1836. 933

ARREST.

For more than recovered, 43 *Geo.* 3. c. 46. 1023

Discharge of bankrupt from. 935

An attorney arrested on a *ca. sa.* swore that he was on his way through the city to *Westminster*, when he thought of going to see a client at the Auction-Mart coffee-house, where he was arrested:—Held, that he was not entitled to be discharged, as he had not sworn that his sole purpose on leaving home was to attend his client's business at *Westminster Hall*. *Strong v. Dickenson*, E. 1836. 683

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The plaintiff had arrested the defendant for 42*l.* 5*s.* money lent, but at the trial only proved an admission by the defendant of the loan of nearly 20*l.*, on which she recovered a verdict for 18*l.* The defendant obtained a rule *nisi* for his costs under the 42 *Geo.* 3. c. 46. s. 3. on an affidavit, in which he swore the plaintiff never lent him more than 1*l.* On showing cause, an affidavit was produced from the plaintiff, stating she had lent him money at different times, amounting in the whole to the sum

for which he was arrested, but did not appear, either from his own affidavits, or from those of other deponents corroborating his statement in many particulars, and she had any evidence of such loan beyond the defendant's admission which was proved at the trial. The court, although they believed to the whole sum was due, and that the defendant had made a false affidavit, held, that as the plaintiff had no reasonable ground for thinking she could recover the amount for which the arrest was made, the defendant was entitled to his costs under the statute. *Lewis v. Ash*, E. 1836. 7

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ATTACHMENT.

See SHERIFF.

ATTAINDER.

A party, in *January* 1815, was convicted of bigamy, and sentenced to be transported for seven years. In *April* following he made a conveyance by lease and release of certain lands in which he had an estate:—Held, that such conveyance was good against the crown there having been no attainder. *The King on the prosecution of Reynolds v. Bridger*, H. 1836. 4

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A party is not entitled to the costs of the taxation of his attorney's bill, though one-sixth is taken off, if the taxation is not applied for till after an action brought on the bill. S. C.

Whether there must be a recovery by verdict, in order to give a defendant a right to costs under 43 *Geo.* 3. c. 46., and whether a court has a right to tax an attorney's bill, except under the statute 2 *Geo.* 2. c. 23., *quære*. S. C.

Where an attorney succeeds in a suit to which he is a party, it is customary to allow him on taxation the same costs as if he were employed for another person.

An action was brought against an attorney, wherein the plaintiff was nonsuited. The defendant acted as his own attorney in the cause and

attended the assizes, but his *London* agent was the attorney on the record:—Held, that the defendant was entitled to the usual costs for such attendance at the assizes, and also to the charges of his *London* agent. *Jarvis v. Dewes*, H. 1836. 240

A rule was granted by the court, calling upon an attorney to pay a sum of money on an appointed day, unless in the meantime he showed cause before a judge at chambers. He was served with a summons to show cause accordingly, but did not appear, and also failed to keep several appointments made with him for payment of the money. On a motion for an attachment against him, the court refused to make the rule absolute in the first instance, but granted a rule nisi only. *Richmond v. Bowdidge, in re Higgins*, H. 1836. 241

Although since the uniformity of process act, 2 *Will.* 4. c. 39. an attorney can no longer sue by attachment of privilege, he is still entitled to sue in his own court; and therefore, when he sues there and recovers less than 40*s.*, the court will not enter a suggestion on the roll in order to deprive him of costs under the *Middlesex* court of requests act. *Wright v. Skinner*, H. 1836. 277

Where a document was shown to an attorney by his client as a matter of business in the course of a professional consultation with him, he cannot be examined as a witness on the point whether that document was then in the same plight as when produced stamped at the trial, viz. to prove whether it was stamped or not at the time of the interview. *Wheatley and another v. Williams*, T. 1836. 1044

An attorney, who, having ceased to practise for some time, has been re-admitted in the court of King's Bench, may be re-admitted in this

court without putting up a notice or making the usual affidavit. *Ex parte James Parry*, E. 1836. 800
The provisions of 3 Jac. 1. c. 7. s. 1. and 2 Geo. 2. c. 23. s. 23. do not extend to the assignee of an insolvent or bankrupt attorney who may sue for business done by such attorney, without delivering a signed bill to the client.

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The plaintiffs, who were attornies, delivered a signed bill, and afterwards made a demand of the amount, giving notice that they should claim interest from that time, pursuant to the 3 & 4 Will. 4. c. 42. s. 28. They subsequently commenced an action, and the bill was referred for taxation without any terms being imposed that they should be paid interest. The master not having allowed them interest, they applied for an order that it might be taxed to them; the judge at chambers refused to make the order, upon which they moved the court for a writ of inquiry to the sheriff, to assess them such interest:—Held, that the plaintiffs ought to have made it a condition, on referring the bill to be taxed, that interest was to be paid, and not having done so, that they were precluded from afterwards claiming it. *Berrington and another v. Phillips*, H. 1836. 322

AUTHORITY.

A. accompanied by *B.* went to the

shop of *C.* and ordered goods saying, in *A.*'s hearing, that he would pay for them if *A.* did —Held, that an implied authority was thereby given by *A.* to *B.* to pay the money on *A.*'s default, that *B.* having paid it, was entitled to recover it back from *A.* in countermand of the authority having been shown. *Alexander v. B.* E. 1836.

BAIL AND BAIL-BOND

See Oyer.

A defendant was arrested on the 24th September, and gave a bail-bond to the sheriff. On the 25th the plaintiff signed a memorandum, whereby he agreed to discontinue the action to be ceased, upon the defendant entering into an agreement to pay him the balance of his account, part in iron, and part in a bill of exchange; but the defendant did not fulfil his agreement, the plaintiff might proceed. The defendant did not fulfil his agreement, and on the 8th October the plaintiff gave him notice that he should go forward with the action. On the 20th the defendant delivered to the plaintiff two bills of exchange, one of them drawn by the brother of the defendant and accepted by the latter, and the other indorsed to the plaintiff. On the 11th November the plaintiff took an assignment of the bail-bond, and on the 14th commenced an action upon it against the defendant and the two bailors and on the 16th the bail was served with the writ of summons. On the 18th the plaintiff declared *de bene esse* in the original action and on the 24th declared against one of the bail alone in the action on the bail-bond: Held, first, that the agreement was conditional, and as the defendant did not fulfil

it on his part, the plaintiff was not bound by it; secondly, that the taking of the bills was not evidence of a new agreement so as to give time to the defendant:— and the court discharged a rule which had been obtained on behalf of the bail to set aside the bail-bond, on the ground that time had been given to their principal. *Vernon v. Turley*, H. 1836. 421

A plaintiff may declare *de bene esse* in the original action, after he has brought an action against the bail upon the bail-bond. *Ib.*

Bail who move to set aside proceedings against them on the ground of their discharge, by giving time to the defendant, must come in a reasonable time; and where the proceedings were commenced in *Michaelmas* term, it was held too late to move in *Hilary* term following. *Ib.*

It is not necessary for bail to justify before they render their principal. *The King v. The Sheriff of Middlesex, in a cause of Hammond v. Bean*, H. 1836. 493

And where the bail, without justifying, rendered their principal after the expiration of the body rule, the court set aside an attachment against the sheriff on payment of costs. *Ib.*

Where bail apply to stay proceedings on the bail-bond, on the ground of having rendered their principal, and not on account of irregularity, the affidavit may be entitled either in the action on the bail-bond or in the original action. *Stride v. Hill and others*, H. 1836. 469

Where in an action on a bail-bond against both the principal and the bail, the latter comply with the rule of court by rendering their principal, the court will stay the proceedings on the bail-bond, although the principal is no party to the application, and although

he will be incidentally relieved by the stay of proceedings. *Ib.*

There must be the loss of an *intermediate* trial before the application to stay proceedings upon the bail-bond, to entitle the plaintiff to have the bond to stand as a security. *Ib.*

The defendant was arrested on the 26th *October*, and deposited the amount of the debt and 10*l.* for costs, with the sheriff in lieu of bail, under the 43 *G. 3. c. 46. s. 2.* On the 10th *November* the sheriff was ruled to return the writ, and on the 17th his agent filed a return, stating the arrest and deposit of the money, and that it had been paid into court. Owing to an inadvertence in sending up the writ without the money it had not been so paid, and in consequence of the absence of the under-sheriff from home, it was not paid in previous to the 23d, on which day the plaintiffs commenced an action against the sheriff for a false return. The sheriff having obtained a rule nisi why he should not be at liberty to pay the money into court, and why it should not remain in court as though it had been paid in due time, the court made the rule absolute on payment of costs. *Hall and others, executors, v. Champneys, Bart.*, H. 1836. 496

On the 20th *November* a judge's order had been obtained on the part of the defendant in the following terms: "I do order that the defendant shall be at liberty to pay into court the sum of 10*l.*, making, with the sum of 94*l. 7s. 1d.* and 10*l.* for costs, deposited with the sheriff of *Carnarvon* in lieu of bail upon the writ, and returned by him as paid into court, the amount required to be deposited by the statute of the 7 & 8 *Geo. 4. c. 71. s. 2.*, to abide the event of the suit in lieu of perfecting bail.

And I do further order that the said defendant enter a common appearance forthwith." On the same day the defendant paid 10*l.* into court, and entered a common appearance; but the money deposited with the sheriff was not paid into court. On the 16th *January* the defendant demanded a declaration:—Held, that the plaintiffs were not obliged to proceed until they obtained what was equivalent to special bail, and the court set aside the demand of declaration with costs. *Hall and others, executors, v. Champneys, Bart.*, H. 1836. 496

A defendant, on being arrested, applied to a party to become special bail for him, who refused, but paid a sum of money into court in lieu of bail:—Held, that the money must be taken to have been paid into court under 7 & 8 *Geo.* 4. c. 71. s. 2., and that the party so paying it could only have it repaid upon the same terms as the defendant could have done if he himself had paid it into court; and the court made a rule absolute for paying it over to the plaintiff in discharge of his debt and costs. *Bull v. Turner*, H. 1836. 367

An exoneretur will be entered on the bail-piece, under 7 & 8 *Geo.* 4. c. 71. s. 4., where, after putting in special bail, but before exception, and before the time for perfecting bail had elapsed, the defendant paid into court the amount of the debt sworn to, and 20*l.*, as a security for the costs under sect. 2. of that act; for he had a right under that section to make that deposit within the time for perfecting special bail in the action, according to the course of the court. *Stamford v. Mac Ann*, M. 1835. 169

Where bail justify by affidavit, having been before rejected, the de-

fendant must make a deposit of costs. *Goodricke v. Turkey*, 1835.

An affidavit opposing a bail on ground of his having been previously rejected, will not succeed without showing that he was rejected for insufficiency. *Ib.* When proceedings on a bail are taken before default in the first action, the court cannot set aside the service of the writ on defect being in suing out the writ. *Edwards v. Danks*, M. 1835.

An assignment of a bail-bond executed by the under-sheriff in the presence of the plaintiff in action and another person.

Held invalid, the statute of 1 *Ann.* c. 16. s. 20. requiring an assignment to be made in the presence of two *credible* witnesses, i. e. disinterested persons. *Wright v. Barrack and another*, E. 1835.

An authority from the sheriff to the under-sheriff to execute the assignment in his name need not be shown, as the latter is possessed of all the authorities belonging to the office. *Ib.*

The plaintiff having obtained a writ at the summer assizes, the judge ordered execution to issue forthwith under 1 *Will.* 4. c. 2. s. 2., and a *ca. sa.* issued accordingly in vacation, returnable not on a given day, but immediately on execution thereof, in the words of 3 & 4 *Will.* 4. c. 67. s. 2. The defendant not being taken, an order was made by a judge in vacation to return the writ under 1 *Will.* 4. c. 39. s. 15. Non est return having been returned, the plaintiff in the same vacation commenced an action against the defendant's bail. The court, in the next term, set aside the proceedings against the bail, holding that they could not be fixed till

following term. *Kemp v. Hyslop and another, bail of Jones*, M. 1835.

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A notice of justification of bail need not state whether the bail intend to justify in person or by affidavit.

Norton's bail, E. 1836. 847

The plaintiff will in this court be allowed the costs of a successful opposition to bail, under *Reg. Gen. Trin. 1 Will. 4. No. 3.*, though not claimed for him till after bail had been permitted to justify on a second occasion. *Lewis v. Glossop*, M. 1835. 190

Suing in vacation on judgment obtained in same vacation. *Kemp v. Hyslop*. 77

The *Reg. Gen. Hil. 2 Will. 4. No. 5.* applies to prevent a plaintiff from having the bail-bond to stand as a security where he has not declared *de bene esse*, though prevented from doing so by the long vacation. *Steans v. Stoneham*, M. 1835. 193

Taking bail-bond with only one surety. See SHERIFF.

BANKRUPT.

Where a motion is made to discharge a defendant out of custody, on the ground that he has become bankrupt, and has obtained his certificate, the affidavit on which the rule is moved should show that the certificate has been inrolled pursuant to the 6 *Geo. 4. c. 16. s. 96.*, and the rule should be drawn up on reading the inrolment. *Osborne v. Williamson*, T. 1836. 935

A defendant, who had obtained his certificate after the action was brought, was held entitled to be discharged out of custody, although the fiat issued ten months before the commencement of the action, and he had pleaded, not setting up his bankruptcy, and had afterwards given a cognovit

to pay the debt and costs at a time subsequent to the period when the plaintiff could have obtained judgment in the regular course of proceeding. *Ib.*

In an action of trover by the assignees of a bankrupt for the lease, utensils, and stock-in-trade of a vinegar manufactory, it appeared that the bankrupt was in possession of the premises, and carried on the business for some years previous to *July 1834*. In that month the defendants came into possession, and continued the business. A letter dated in *March 1834*, from C. one of the defendants, was given in evidence, which showed that the bankrupt was then in embarrassed circumstances and wished to dispose of the manufactory, and that he was indebted to C. in 3500*l.*, and that C. then stated the bankrupt had no money, and could not go on. No evidence was adduced of any assignment of the goods in question by the bankrupt to C. The fiat bore date in *January 1835*. *Ody and others, assignees of Moore, v. Cookney and Williams*, H. 1836. 536

The plaintiffs having submitted to a nonsuit, the court refused to disturb it, on the ground that *prima facie* the act of bankruptcy must be taken to have been committed at the time the fiat bore date, and that there was no evidence of any act of bankruptcy (which is to be proved and not to be presumed) committed by the bankrupt in *July 1834*. *Ib.*

To establish a *prima facie* case of possession of property by a bankrupt, his assignees must show that his possession continued down to the time of the bankruptcy. *Ib.* Compelling return of *fi. fa.* 189

BASTARDY.

By the 4 & 5 *W. 4. c. 76. s. 57.*,

the putative father of a bastard, on whom an order of maintenance had previously been made, is no longer liable under such order, where the mother, since the passing of this act, has married another person, who is of sufficient ability to support the child. *Laing v. Spicer*, H. 1836. 358

Semble, that even if the husband were not of ability to maintain the child, that the father would not be liable. *Ib.*

BASTARDY-BOND.

A bastardy bond was conditioned to indemnify a parish against all manner of charges incurred for or by reason of the birth, education, and maintenance of a bastard child, and of and from all charges and demands concerning the same. The bastard before his full age, but after supporting himself for some years, married, and with his wife and family became chargeable:—Held, that the obligor of the bond was not liable. *Wandley and another v. Smith*, M. 1835. 194

BEASTS OF PLOUGH.

See DISTRESS.

BEFORE THEN.

In pleading. 179

BEYOND SEAS. 441

BILLS AND NOTES.

See AFFIDAVIT TO HOLD TO BAIL.

In an action by *A.* (*Lewis*), the indorsee of a bill of exchange, against *B.*, the acceptor, (*Lyster*), the plea was, that *C.* the drawer (*Bouverie*), indorsed the bill to *D.* (*Calvert*), who indorsed it to *E.* (*Braithwaite and Jones*), who indorsed it to *F.* (*Chawner*), in whose hands it remained when due; that *F.* being unable to obtain

payment for it, returned it to who continued to hold it till (the defendant), before indorsing it to *A.* (the plaintiff), delivered to *E.* another bill, also drawn by *C.*, accepted by the defendant for a larger sum, which *E.* accepted, and received in full satisfaction and discharge of the first bill. The plea was held good demurrer, though it did not shew the second bill to be payable in order, and so to be negotiable, and a defective statement was followed, viz., that the defendant paid the plaintiff the amount of the second bill when due, which he accepted in satisfaction of the last-mentioned bill, and all damages sustained by the plaintiff by reason of its non-payment, was rejected as surplusage. *Lewis v. Lyster*, M. 1835.

Interest on bill.

Assumpsit on a bill of exchange 43*l.*, by an indorsee against acceptor. Plea: that after bill became due, the drawer of bill made his promissory note 44*l.*, and delivered it to the plaintiff in satisfaction and discharge of the bill, and that the plaintiff accepted it in satisfaction and discharge of such bill. Replication that the promissory note remained due and unpaid:—Held, on demurrer, that the replication was bad, and that the plaintiff having taken a note for a larger amount than the bill in full satisfaction thereof, his only remedy was upon the note. *Sard v. Rhodes*, L. 1836. 26

Assumpsit by the drawer against the acceptor of a bill of exchange. Plea: that the defendant being a trader, was indebted to the plaintiff in 100*l.* and upwards, and also to divers other persons large sums of money; that he became a bankrupt, and a fiat upon the petition of the plaintiff was

awarded against him; that before he was adjudged a bankrupt or had obtained any certificate of conformity to the fiat, it was wrongfully, and against the form of the bankrupt laws, agreed between the plaintiff and the defendant, without the concurrence of the other creditors, that the plaintiff should abandon the fiat and all proceedings thereunder; and that in consideration thereof the defendant should accept the said bill of exchange and deliver the same to the plaintiff. The plea then averred the acceptance and delivery of the bill accordingly, and that the consideration in the plea mentioned was the consideration for the acceptance thereof:—Held, on demurrer to the plea, that the agreement therein set forth on the part of the plaintiff to abandon the fiat was illegal, on the ground of its being an abuse of a process, which a creditor has a right to sue out not for his own benefit only, but for the benefit of the other creditors also. *Davis v. Holding*, H. 1836. 371

An agreement made contemporaneously with the accepting a bill for the accommodation of the indorsee, that if outstanding when due, it should be taken up and paid by him, and that no demand should ever be made in respect of it, on the drawer or acceptor, is a good defence in an action by the indorsee against the acceptor; for it is an agreement merely collateral to the bill, not varying its terms or rendering any party to it less liable to a claim by any third person being a *bonâ fide* holder for value. *Thompson v. Clubleby*, H. 1836. 482

A declaration upon a bill of exchange stated, that on a certain day the plaintiff made his bill of exchange payable one month after date, “which period has now elapsed,”

following the form given in the rule of *Trinity* term, 1 *Will.* 4. Sched. No. 4. The declaration was specially demurred to, on the ground that it did not appear that the bill was due at the time of commencing the suit, and that it was consistent with the allegation in the declaration that the bill became due after action brought. The court refused to set aside the demurrer as frivolous.

Semble, that since the uniformity of process act, the above form is bad on special demurrer. *Aslett v. Abbott*, H. 1836. 448

The defendant was arrested for 32*l.* 6*d.*, the amount of a bill of exchange, but the sum indorsed on the capias was 39*l.* 3*s.* 6*d.*, which was made up of the 32*l.* 6*d.*, with 7*s.* interest, and of a sum of 6*l.* 16*s.* the amount of a chose in action, which the plaintiffs could not recover in their own names. The defendant took out a summons to stay proceedings on the payment into court of 32*l.* 6*d.* The plaintiffs refused to accept that sum, saying, that more was due; whereupon the judge before whom the summons was heard, made an order, dated the 4th *November*, that the defendant should be at liberty to pay the sum refused into court, and if the plaintiffs should recover no more they should not be entitled to costs from that time. On the following day the defendant's attorney wrote to the attorney for the plaintiffs, saying, that he had entered an appearance, and would accept a declaration, if the latter thought it right to continue proceedings in the face of the order. On the 12th the defendant's attorney wrote again, announcing that having received no reply he had paid the money into court. On the 9th *January* the plaintiffs' attorney declared conditionally until special bail was put in and per-

fect. A rule having been obtained to set aside the declaration for irregularity, and to stay all further proceedings on payment of the plaintiffs' costs prior to the date of the judge's order:—Held, first, that the plaintiffs were entitled to the interest on the bill of exchange; secondly, that the plaintiffs might treat the appearance entered by the defendant as a nullity, and declare conditionally until special bail was put in. And the court discharged the rule, with costs, unless the defendant should elect to pay the interest and the costs of the action up to that time; and in the event of his so electing, the rule to be absolute upon those conditions. *White and others v. Cobham*, H. 1836. 507

In February 1829, *A.* and *B.* being in partnership as brewers, *B.* advanced 300*l.* to *D.* out of the funds of the firm, and took his promissory note for the amount, payable on demand to the order of *B.* In November following *C.* purchased the interest of *A.*, and the business was from that period carried on by *B.* & *C.*, and a notice of the change in the firm was at the time inserted in the *Gazette*, signed by *A.*, *B.* & *C.*; and persons indebted to the firm were directed to pay their debts to *B.* & *C.*

In August 1831, *B.* represented to *D.* that the firm wished for a fresh security, and obtained from him his acceptance for 300*l.* in substitution for the note which *B.* undertook to get from *A.* and deliver up, but which was not done.

In April 1831, the note was indorsed by *B.* to *B.* & *C.*, and by them to *A.* as a security for advances made by him. In December 1831, *B.* & *C.* became bankrupts. In June 1832, *D.* paid *A.*'s attorney the amount of the bill of exchange. In 1835, *A.* brought

an action against *D.*'s representative on the promissory note.

Held, that *A.* was entitled to recover, unless the jury could find that under the circumstances must have known that the bill of exchange was given for the debt as in the note. *Adams v. Ann Bingley, administratrix of Richard Bingley, deceased*, H. 1835.

A count by indorsee against acceptor of a bill, stated that the drawer required the defendant to pay the sum to his order:—Held, on special demurrer, that the count would see that *his* referred to the drawer and not to the defendant, though the last antecedent was substantive. *Spyer v. Thelwell*, H. 1835.

Proving consideration after *de jure* replied to plea that bill obtained by fraud. *Isaac v. Farwell*, H. 1836.

Assumpsit against the acceptor of a bill, by the immediate indorsee against the drawer. Plea, that defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, or the defendant receive, any consideration for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration. Replication, that the drawer indorsed the bill to the plaintiff for good and valuable consideration:—Held, that the whole admission by the plaintiff on the pleadings being that the bill was in its inception an accommodation bill, for accepting which by the defendant the drawer gave him no consideration, the onus of proof in the first instance rested on the defendant; but that in cases in which the holder's title to the bill is shown to be connected

with some fraud, *e. g.* illegal taking, loss or larceny &c., the holder is bound to begin and prove in the first instance that he gave value for the bill sued on. *Mills v. Barber*, E. 1836. 835

See *Edmunds v. Groves*, 2 M. & W. 642, E. 1837.

In an action by the drawer against the acceptor of certain bills, payable at fixed dates, the plea was, that by agreement made between the plaintiff and defendant, contemporaneously with the acceptance of the bills by the latter, the payment of them was not to be required by the plaintiff, till he should recover in a certain action against a third person, or if he should not recover in it; and it was also averred that the plaintiff had not recovered in the action, and that the bills sued on were two of those drawn by the plaintiff as aforesaid:—Held, on demurrer, that the plea was bad, for not showing that the agreement for varying the absolute contract expressed on the bills was in writing; and, *semble*, for not denying the defendant's liability on any other contract with the plaintiff, besides that on the bills. *Adams v. Wordley*, E. 1836. 620

Contract for giving up a bill to the acceptor. 628

In trover for a bill of exchange, it appeared from the pleadings, that the defendant (*Hampshire*), who was resident in *England*, received it from the payee (*Usher*), who lived at *Belize*, specially indorsed by him to the order of the plaintiff's wife (*Brind*). The defendant was directed by *Usher* to hand over the bill to Mrs. *Brind* for her schooling of his children. The defendant got the bill accepted by the drawees in *England*, gave Mrs. *Brind* notice, by a letter sent by post, that he had received and held the bill for the purpose

directed by *Usher*, and desired Mrs. *Brind* to inform him when and how it should be delivered, promising to attend to such information by her; but before the plaintiff or Mrs. *Brind* demanded the bill, and while it remained in the defendant's hands on the direction and for the purpose above described, *Usher* countermanded the direction he had first given, and ordered the defendant to keep the bill and its proceeds in his hands, and to have a fair scrutiny into Mrs. *Brind*'s accounts, and after that to pay her what might be due to her. No such scrutiny took place, though the defendant was ready to make it, and the defendant detained the bill:—Held, on demurrer, that as the original direction by *Usher* was countermanded by him before the bill had been handed over by the defendant, or accepted by the plaintiff or Mrs. *Brind* in payment of the debt due by *Usher*, the defendant was not liable to an action of trover for the bill. *Brind v. Hampshire*, E. 1836. 790

A second indorsee brought an action against the acceptor of a bill of exchange, to which the latter pleaded, that it was indorsed to the plaintiff after it became due. At the trial it was proved on the part of the defendant, that the bill was drawn and accepted for the accommodation of *R.*, the first indorsee, in *July* 1830. At the time the bill became due, *R.* and the defendant were on friendly terms, but they afterwards quarrelled. No notice of its dishonour was given to the drawer. The action was not brought until the present year (1836). *R.* was not called by either party at the trial:—Held, that there was evidence to go to the jury, that the bill was indorsed to the plaintiff after it became due. *Bounsall v. Harrison*, T. 1836. 925

Assumpsit on two bills of exchange by indorsee against drawer. Plea, that the acceptor was in want of a loan of 300*l.* and applied to the plaintiff to advance it, which he did, on an agreement of the acceptor to take it two-thirds in money and one-third in wine, and to pay for the same by bills drawn by the defendant, and accepted by the borrower. That the defendant had notice of these terms, and the bills were accordingly drawn and accepted. The plea proceeded to state that no consideration ever passed to defendant for drawing the bills, that the wine was never delivered, and that the contract for the sale and delivery thereof was a gross fraud on the acceptor and the defendant.

Replication, that at the time of drawing the bills there was a good and sufficient consideration in value for the drawing and indorsing the bills by the defendant, concluding to the country. Special demurrer, that the replication neither traversed nor confessed and avoided the plea, and should have concluded with a verification. The court held the plea bad, for not answering the whole declaration, and the plaintiff had judgment. *Connop v. Holmes*, M. 1835. 85

Quære, if fraud can be laid thus generally in pleading? *ib.*

Semble, the replication should have concluded with a verification. *ib.*

Assumpsit against a drawer and indorser of a bill of exchange. Plea, denying the drawing and indorsements. At the trial a witness for the plaintiff stated he had received letters from the defendant's place of business, in the same hand-writing in which the bill was drawn and indorsed. An offer to the defendant to compromise after action brought, was also proved.

For the defence three witnesses swore positively that the writing was not the defendant's:—Held, that though the three witnesses for the defence rebutted the inference that the writing on the bill was the defendant's, yet the offer to compromise was evidence recognizing the hand-writing on the bill, whether that of the defendant or of some other person, was sufficient to go to the jury. *Holmes v. Jones*, M. 1835. Stamping properly where written and stamped.

BODY RULE, 493.

See BAIL.

BOND.

Debt on a joint money bond for a penal sum of 2800*l.* against two survivors of three obligors. Oyer of the condition for securing the repayment of 1400*l.* and interest. The plea then stated that 800*l.*, parcel of the sum of 1400*l.* in the condition mentioned, after the day named in the condition the defendant paid the plaintiff the sum of 800*l.*, parcel of the sum of 1400*l.* Held bad on special demurrer, being only a *placet solvit post diem* of part without answer as to the residue, viz. 600*l.* which was forfeited by non-payment at the day named in the condition. *Elizabeth Ashbee, administratrix of John Ashbee, v. Pidd and another*, T. 1836.

Another plea stated that the two defendants were only survivors for the deceased obligors, and the plaintiff had given a release to the representative of the deceased. Held, that as it did not appear either from the bond or condition that the defendants were other than original debtors, the plea was

against them, no answer to the action. *Ashbee v. Pidduck and another*. 1016

In debt on bond, no breach, by non-payment of the money, need be alleged, if the declaration show the debt to be due on the bond; for it then lies on the defendant to discharge himself by plea of payment &c. *S. C.*

See OFFICE AND OFFICER.

BOUGHT AND SOLD NOTES, 820.

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See *Ingle v. Bell*, 801.

BRISTOL.

The 5 *Geo.* 4. c. lxxix. "for lighting and watching the parish of *Clifton*, in the county of *Gloucester*," does not extend to the parts of the parish of *Clifton* which by the 16 *Geo.* 3. c. 33. and 43 *Geo.* 3. c. 140. were added to the city of *Bristol*. *Bartlett v. Watkins*, H. 1836. 546

BUILDING ACT.

The building act, 14 *Geo.* 3. c. 78. s. 43. authorizing the raising or rebuilding of a party fence-wall, does not protect a person from liability in respect of collateral damage resulting from the erection so made; and an action on the case may be maintained by the owner of the adjoining house for heightening a party-wall, whereby his lights are obstructed. *Wells v. Ody*, E. 1836. 715

CAPIAS.

A capias issued into *Surrey* on an affidavit of debt, of which a copy was placed on the *Surrey* file. The defendant not being arrested on that writ, a capias and an alias capias were afterwards issued on the same affidavit into *Middlesex*,
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by the same officer, and within a year from its date: Held, that the alias capias was regular, being founded on an affidavit which had not become stale by being more than a year old, and the plaintiff having a right to abandon the first capias into *Surrey*, and issue another into *Middlesex*, as if there had been no previous writ at all, and the affidavit being sworn before the same officer who issued the process into both counties. Nor do Nos. 6 and 7 of *Reg. Gen. Mich.* 3 *Will.* 4. make any difference in the case. *Ramsden v. Maugham*, M. 1835. 40

A capias issued into *London* on an affidavit to hold to bail, which was perfectly regular. The defendant not being taken in *London*, another capias issued into *Middlesex*, on a fresh affidavit, which was bad for having no date in the jurat, and no other affidavit was filed, showing the day of the swearing: Held, that the second capias was regularly issued, the first made affidavit being sufficient to sustain it. A prisoner may move to be discharged for irregularity in process, after the time when other motions for irregularity must be made. *Rock v. Johnson*, M. 1835. 43

A capias which described the defendant as "*T. S.* a clerk in the Army Pay Office, *Somerset House*, in the city of *Westminster* and county of *Middlesex*," was held insufficient, for the blank — following the words "*C. D.* of," in the form No. 4, provided by 2 *Will.* 4. c. 39. should have been filled up with the place of the defendant's actual or supposed residence, or if the plaintiff is ignorant of these, then with the place where the defendant then is, or is supposed to be, by analogy to the directory part of s. 1. respecting writs of summons. *Rolfe v. Swan*, E. 1836. 665

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A capias issued into *Surrey* on an affidavit of debt, of which a copy was placed on the *Surrey* file. The defendant not being arrested on that writ, a capias and an alias capias were afterwards issued on the same affidavit into *Middlesex*,

by the same officer, and within a year from its date: Held, that the alias capias was regular, being founded on an affidavit which had not become stale by being more than a year old, and the plaintiff having a right to abandon the first capias into *Surrey*, and issue another into *Middlesex*, as if there had been no previous writ at all, and the affidavit being sworn before the same officer who issued the process into both counties. Nor do Nos. 6 and 7 of *Reg. Gen. Mich.* 3 Will. 4. make any difference in the case. *Ramsden v. Maugham*, M. 1835. 40

A capias issued into *London* on an affidavit to hold to bail, which was perfectly regular. The defendant not being taken in *London*, another capias issued into *Middlesex*, on a fresh affidavit, which was bad for having no date in the jurat, and no other affidavit was filed, showing the day of the swearing: Held, that the second capias was regularly issued, the first made affidavit being sufficient to sustain it. A prisoner may move to be discharged for irregularity in process, after the time when other motions for irregularity must be made. *Rock v. Johnson*, M. 1835. 43

A capias which described the defendant as "*T. S.* a clerk in the Army Pay Office, *Somerset House*, in the city of *Westminster* and county of *Middlesex*," was held insufficient, for the blank — following the words "*C. D.* of," in the form No. 4, provided by 2 Will. 4. c. 39. should have been filled up with the place of the defendant's actual or supposed residence, or if the plaintiff is ignorant of these, then with the place where the defendant then is, or is supposed to be, by analogy to the directory part of s. 1. respecting writs of summons. *Rolfe v. Swan*, E. 1836. 665

No statute or rule of court compels a

plaintiff to indorse the place of the defendant's abode on a *ca. sa.* (See *Reg. Gen. Hil. 2 & 3 Geo. 4.* in K. B.) *Strong v. Dickenson, Gent. one &c. E. 1836.* 683

See WRIT OF CAPIAS.

CHARITABLE GIFT.

See LEGACY DUTY.

CHURCHWARDENS AND OVERSEERS.

Motions involving points of law and construction of an act of parliament ought not to be taken at chambers, but should be made in full court. *Doc on the demises of the Churchwardens of Llandysilio v. Roe, T. 1835.* 1084

Churchwardens and overseers suing under 59 Geo. 3. c. 12. s. 17. must sue in their own names, describing themselves as churchwardens and overseers of the poor of the parish; and the court directed counts on demises by them, in which they were termed churchwardens and overseers only, without setting out their names, to be struck out. S. C.

CINQUE PORT.

Quære, whether the gaol of the cinque port of *Dover* is a gaol to which a defendant may be rendered under the 1 Will. 4. c. 70. s. 21. *Stride v. Hill and others.* 469

COGNOVIT.

A cognovit subscribed thus: "witness to the signing by the said R. F., (the defendant,) C. B. P. attorney for the said defendant," is not only a sufficient declaration of C. B. P. being attorney for the defendant, but also a sufficient statement that he "subscribes as such attorney" within *Reg. Gen. Hil. 2 Will. 4. No. 72. Lees v. Fry, T. 1835.* 1084

COLLECTOR.

See OFFICE AND OFFICER.

COMMISSION.

See WITNESS.

COMMITTEE OF CANDIDATES FOR M. P.

See *Thomas v. Edwards, 872.*

COMMON PLEAS AT LANCASTER.

Before this court will order execution to issue under 4 & 5 Will. 4. c. 31. against a defendant on a judgment obtained in the court of Common Pleas at Lancaster, affidavit must be produced (entire in this court) that he has removed either his person or his goods out of the jurisdiction of the court below. *Duckworth and another v. Fogg, M. 1835.*

CONDITION PRECEDENT.

See *Hertford (Marquis) v. Hunt, 10*

CONSTABLE.

Where a constable apprehends a person under the *bond fide* belief that he has committed an offence against the 7 & 8 Geo. 4. c. 30., (the Malicious Trespass Act,) such constable is entitled to notice of arrest under the 41st section, although he did not see the alleged trespass committed, and there is no proof of the owner of the property injured having made any complaint to him. *Ballinger v. Ferris, 1836.*

CONTINUING SECURITY.

See OFFICE AND OFFICER.

CONTRIBUTION.

See ASSUMPSIT.

The rule that there is no contributory

among wrong-doers does not apply to a case where the party seeking contribution is a tort-feasor merely by inference of law.

Several persons were jointly interested in a stage coach, and there was a partnership fund out of which the expenses were first to be paid, and the residue divided among them.

Held, that one proprietor who had paid the damages and costs recovered in an action which had been brought against him for damage done by the negligent driving of the coachman, could not recover at law from another proprietor his proportion of such damages and costs. *Pearson v. Skelton*, E. 1836.

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CONVICT.

See HUSBAND AND WIFE.

CONVICTION.

See ATTAINDER.

CORRUPTING VOTERS.

An averment in a declaration for a penalty that the defendant did corrupt one *J. W.*, who had then a right to vote at an election of town councillors, by corruptly promising to give him employment in hauling stones for hire, to be paid him for the same, which employment was promised to *J. W.*, as and for a reward to him if he should vote at such election for particular persons, is sufficiently laid as a promise of a *reward*, so as to subject the party offering it to a penalty of 50*l.* under s. 54 of 5 & 6 *Will.* 4. c. 76: unless, on proper issues joined on the record, the employment should be found by a jury to have been promised to the voter without a corrupt object on the part of the party promising. *Harding v. Stokes*, E. 1836. 599

Held also, that as the offence was laid to be "contrary to the

form of the statute," it was not necessary to lay it to have been committed "after the passing of the act," though that took place very recently before: and that at all events, an allegation that an election of councillors took place "in pursuance of the act," and that the "defendant, not regarding the statute," corrupted the party to vote in such election, was sufficient. *Harding v. Stokes*, E. 1836. 599

COSTS.

See ATTORNEY—EXECUTORS.

Assumpsit on an undertaking by the defendant to pay such costs as the plaintiff should incur in an action to be brought by him against *G.* on a bill of exchange, drawn on him by the defendant and then due, which the plaintiff had agreed to take up for the defendant's honour. There was also a count by the plaintiff as indorsee of the bill, with a count for money paid, interest, and on an account stated. Pleas: first, payment into court on the first count (of a sum which covered the plaintiff's costs out of pocket); secondly, to the second count, that after the bill became due, the defendant paid a certain sum in part satisfaction of it, and indorsed to and gave the plaintiff another bill which he took in satisfaction of the residue of the bill declared on. The issue on the first plea was, whether the plaintiff had sustained further damages than the sum paid into court; and on the second plea was, whether the second bill was so given and accepted in satisfaction of the first, or only as a collateral security. The first particulars of demand only embraced the count on the bill. The defendant obtained an order for "particulars" of the bill of costs, charges, and expenses mentioned in the first count." The

particulars delivered under this order were a copy of the plaintiff's whole bill of costs in the action against G., and also the amount of the bill and interest. Held, that the costs out of pocket could be recovered on the first count; and the rest of the bill on the account stated. *Fisher v. Wainwright*, E. 1836. 606

Held also, that had the particulars been insufficient to enable the plaintiff to recover the costs on the account stated, proof by the defendant of an unsigned paper delivered to him by the plaintiff as a statement of plaintiff's claim against G., one item being his bill of costs, was not such unambiguous evidence of an account stated between them as would have entitled the plaintiff to recover those costs under the last count, notwithstanding such defective particulars, upon the proofs adduced by his adversary. *Ib.*

Where notice of trial of a cause is given for a sitting in term, and the defendant resides above forty miles from *London*, a two days' notice of continuance of trial to the next sitting, is not sufficient to save the plaintiff from paying the defendant's costs of the day for not proceeding to trial at the first sitting. *Forbes v. Crow*, E. 1836. 670

In an action brought to recover 21*l.* 1*s.* the defendant took out a summons to stay proceedings on the payment of 12*l.* 12*s.* 6*d.* into court. The plaintiff having refused to accept that sum, the judge before whom the summons was heard, made an order that the defendant should be at liberty to pay the money into court, and if the plaintiff should recover no more, then the defendant should not be liable to costs from that time. The defendant afterwards offered to pay 15*l.* and costs, in order to settle

the action. The plaintiff subsequently signed judgment twice want of a plea; both of which judgments were set aside for irregularity. The defendant having pleaded the payment of the money into court, the plaintiff the next day took the money out, and gave notice to tax his costs, and six days afterwards delivered a recitation, whereby he accepted of the money paid into court in full satisfaction of his debt. The defendant having obtained a rule why the defendant's costs, subsequent to the summons to pay money into court, should not be allowed and set off against the costs of the plaintiff; the court on cause being shown, did not lay down any general rule of practice, but, under the particular circumstances of the case, discharged the rule in question. *Willes v. Davies*, H. 1836.

Per *Parke B.*—It is *prima facie* vexatious in a party to receive money paid into court, and afterwards to take it out, and he ought to be made to pay all the subsequent costs, unless he shows good cause of exemption. *Ib.*

An action brought against two magistrates for an act done in the execution of their office, was discontinued on the 3d *December*, and the following day their attorney tendered the taxation of their costs when single costs only were allowed. The attorney afterwards applied to the master to alter the allocatur by marking double costs under the 7 *Jac.* 1. c. 5., which he stated he could not do without a rule of court. During the same day the attorney made an application to the plaintiff's attorney to allow double costs, which the master would not do. On the next day the single costs were tendered and refused. On the 20th *January* the plaintiff's attorney offered

go before the master and agree that he should allow the defendants double costs, but their attorney then insisted on having a consent to a judge's order to enter a suggestion. The plaintiff had commenced a second action on the 13th *January*. The defendants having obtained a rule why they should not be at liberty to enter a suggestion to entitle them to double costs, the court discharged the rule, on the ground that they might have obtained such costs without applying to the court. *Fosbrook v. Holt and others*, H. 1836.

464

Semble, that a suggestion is unnecessary to entitle a defendant to double costs under the 7 *Jac.* 1. c. 5. *Ib.*

Where a plaintiff sues in trespass in *forma pauperis*, and obtains a verdict for nominal damages, he is entitled to full costs, but only of those witnesses, and of such parts of the briefs as were requisite to support the count on which he succeeded, after abandoning the others. *Gougenheim v. Lane and five others*, M. 1835.

216

A pauper plaintiff is not within *Reg. Gen. Hil.* 2 *W.* 4. No. 74., nor can the costs of such several defendants as have got verdicts, be deducted from his general costs of the cause. *Ib.*

In case by a reversioner for breaking a wall, the defendant pleaded not guilty, and justified under a right to a drain, and to break the wall to clean it. Plaintiff traversed the right in the replication, but afterwards withdrew the traverse and new assigned excess. Defendant thereupon pleaded not guilty to the new assignment, but afterwards withdrew that plea and also so much of his original plea of not guilty as applied to that part of the declaration covered by the new assignment, paying into court

10*l.*, which the plaintiff took out of court in satisfaction of the damages for which the action was brought. Held, that the plaintiff was entitled to the costs of the writ and of the new assignment, and other subsequent proceedings, but that the defendant was entitled to the other costs and to the general costs of the cause. *Griffiths v. Jones*, T. 1836.

1131

Semble, the plaintiff would have been entitled to some part of the costs of the declaration, could it have been ascertained. *S. C.*

The party who succeeds at a second trial will not be allowed, in taxation, the costs he has incurred for copies of a short hand writer's notes of the evidence given at the former trial. *Crease v. Barrett*, M. 1835.

112

The proper course for a party who wants a transcript of the evidence adduced at the former trial appears to be to apply to the clerk of the judge who presided, for a copy of his notes, and the expense of obtaining such copy would, it seems, be allowed in costs. *Ib.*

Jurisdiction of courts to tax bills independent of the statute. 1025

COSTS, (SECURITY FOR).

A motion for security for costs, on the ground of the plaintiff's absence from *England*, must be made before issue joined, and as soon as the defendant knows the plaintiff to have left the country, as well as before he takes any further step. If made after issue joined, the court must be satisfied that the defendant did not, before that step in the cause, know of the plaintiff's absence. After trial and a jury discharged from giving a verdict, it is too late to move for security for costs of another trial, where the defendant knew that

the plaintiff left *England* after issue joined and before the first trial. *Wainwright, executor of Abercromby, deceased, v. Bland and others*, M. 1835. 37

A rule nisi for security for costs will be granted, though the defendant do not state in what stage the cause is, the motion being at the defendant's peril if too late. *Cole v. Perry*, T. 1837. 1000

COUNTS.

See PRACTICE. (*Striking out Counts.*)

COURTS OF REQUESTS.

To an action of assumpsit the defendant pleaded, first, the general issue as to part of the demand; and fourthly, that the debt for which the action was brought did not amount to 40s., and that he the defendant was resident within the jurisdiction of the *Tower Hamlets Court of Requests' Act*, 23 G. 2. c. 30. At the trial the jury found a verdict for the plaintiff under the general issue, damages 1l. 6s., and for the defendant upon the fourth plea. The defendant having obtained a rule nisi to enter a suggestion under the act to deprive the plaintiff of his costs, and to entitle the defendant to costs, the court, on showing cause, discharged the rule, on the ground that the defendant might obtain the benefit of the act by entering up judgment under the fourth plea. *Defries v. Snell*, M. 1835. 206

Nothing in sect. 19. of the *Middlesex County Court Act*, 23 Geo. 2. c. 33. entitles a defendant to double costs, where the plaintiff's damages are reduced below 40s. by the proof of a set-off; for by reference to sect. 1. and sect. 4., the plaintiff could not have sued in the inferior court for his original debt, and could not compel

the defendant to plead a set-off. *Jenkinson v. Morton*, E. 1836. 6

A defendant is not deprived of benefit of a Court of Requests Act by payment of money in court, or by consenting to a trial before the sheriff. *Turner v. Leonard*, T. 1836.

Where a defendant seeks to enter a suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a court of requests, he cannot have the costs of an issue which has been found in his favour, taken for him in the superior court.

The *Birmingham Court of Requests Act*, (47 G. 3. c. 14. s. 1) requires that parties having debts not exceeding 5l. owing to them from persons inhabiting within the town of *Birmingham* "or using or frequenting the markets there, or working or seeking a livelihood, or in any way trading or dealing within the same," should sue in the court of requests. Held, that persons using or frequenting the markets, or trading or dealing, must be with a view of thereby substantially obtaining the whole livelihood of the party. *Jenks and another v. Taylor*, T. 1836. 9

The *Westminster Court of Requests* as constituted by 14 G. 2. c. 3. and 24 G. 2. c. 42. has no jurisdiction in actions on the case for unliquidated damages, but in actions for ascertained debts not exceeding the fixed amount, may proceed as well by the rules of equity as law. *Soames v. Rallings*, M. 1835.

COVENANT.

To paint house. See PLEADING.

COVENANT TO STAND SEISED.

By indenture between *E. P.* and *l.*

bel his wife of the one part, and *W. T.* of the other part, *E. P.*, for settling certain hereditaments, did covenant with *W. T.* that he, *E. P.*, and his heirs, would stand and be seised of such hereditaments to his, *E. P.*'s use for life, remainder to the use of the said *Isabel* for her life, with remainder (after limitations to the sons and daughters of the marriage,) *to the use of the heirs and assigns of the said Isabel, the wife of the said E. P., for ever.* There was no issue of the marriage. *Isabel* survived her husband *E. P.*, and died about 1782, having devised the property in question to *E. W.* In 1782, *E. W.* levied a fine thereof with proclamations, *sur conusance de droit come ceo*, to enure to the use of herself in fee simple, and died seised twelve years after, having devised the property by will dated April 1794. A contract was entered into by the plaintiffs and defendants for selling the property to the defendants, and the question was on *Isabel P.*'s right to devise, as having being seised in fee under the rule in *Shelly's* case, and whether *E. W.*, at the date of her will, was seised in fee of the property in question. The court certified to the Master of the Rolls that she was, and *comm. semb.* without reference to the fine by *E. W.* *Hood and others v. Pimm and another*, E. 1834. 1118

CREDIT.

In an action by the executor of an innkeeper against the chairman of the committee of a candidate at a contested election, for refreshments supplied to voters, but which were directly ordered by a third person, one *M.*: Held, that before the plaintiff could recover, he was bound to prove that *M.* was employed by the defendant alone, or by the defendant and others, to

give the order, and that the defendant in so employing *M.* was not acting as agent for any other person, or else that *M.* was not a mere agent, but acted jointly with the defendant, or with the defendant and others; and that it would make no difference that the plaintiff's testatrix considered *M.* as authorized to contract on behalf of the candidate, if the fact was not so. *Thomas, executor, v. Edwards*, E. 1836. 872

CUSTOM OF COUNTRY.

See *Hutton v. Warren*, 646.

CUSTOMS LAWS.

Certain goods, the produce of *Asia*, being admissible to customs duty for use in the united kingdom, from *Asia* direct, in a *British* ship, were imported into this country from *Holland*, contrary to the navigation act now in force, 2 & 3 Will. 4. c. 54. s. 3. An information was filed on sec. 44 of 3 & 4 Will. 4. c. 53. (the smuggling prevention act) against the owner of the goods for the treble value of them, charging him with being concerned in the unshipping of goods prohibited to be imported into the united kingdom, and alleging that the goods were "then and there liable to the duties of customs, the said duties of customs for the same not having been first paid or secured." Held, that the information was good, the allegation in question being framed in pursuance of the imperative terms of 3 & 4 Will. 4. c. 53. s. 30. *Attorney General v. Greaves*, M. 1835. 48

A recognizance was conditioned for payment of costs occasioned by the defendant's claim to a sloop which had been seized as forfeited to his majesty and the seizing officers, under a smuggling act, 3 & 4 Will.

4. c. 53. s. 2. Held, that the condition was broken by the non-payment to the seizing officers of the 'costs occasioned by the claim,' though not incurred personally by them. *The King v. Bullock and others*, T. 1836. 998

DAMAGES.

Actual, from not arresting. See SHERIFF.

Distinction between assessing on breaches of a bond assigned under 8 & 9 Will. 3. c. 11. s. 8. and on like breaches suggested on the roll. See 407.

Reducing. See PAYMENT.

DAYS.

Calculating number of, in notice. 74

DEATH.

Of plaintiff before verdict.

Where it was to be inferred from circumstances that a ship in which the plaintiff had embarked was lost at sea before the assizes at which a verdict was recovered in his name, though it did not appear positively that the plaintiff had perished; the court granted a rule for continuing the *postea* in the hands of the associate, with stay of execution. *Johnson, administrator of Stamford, v. Hamilton*, M. 1835. 45

A rule nisi having been granted to stay the *postea* in the hands of the associate, on the ground that the plaintiff had been lost at sea before the trial, the court, on cause being shown, discharged the rule, the affidavits on which it was obtained showing only a strong probability of the death of the plaintiff, but disclosing no fact that would be evidence before a jury. *S. C. H.* 1836. 574

Seemle, that if the facts had been conclusive as to the death, the court would have made the rule absolute. *Ib.*

DEBT.

Question in action of.

DECLARATIONS.

See EVIDENCE.

DELIVERY OF GOODS.

See VENDOR AND PURCHASER.

DEMAND OF PLEA.

DEMURRER.

To all instead of part of a declaration. 1

On the 23d December the defendant demurred to the plea pleaded by the plaintiff, who, on 1st January, obtained a week's adjournment in demurrer, which was afterwards extended until the 12th by a judge's order. On that day the defendant obtained a rule setting aside the bail-bond with proceedings in the matter against which cause was shown on the 26th, when the rule was discharged with costs. In the evening of that day the plaintiff signed a joinder in demurrer. About seven o'clock in the evening, and after such joinder was signed, a joinder in demurrer was delivered: He the judgment was signed to and the court set it aside as void, but on the terms that the defendant should join in demurrer instant, viz. before eight in the evening.

The court will abide by such joinder, that demurrer books must be delivered four days before argument. *Vernon, assignee of the St. Staffordshire v. Hodgins*, H

DEPOSIT IN LIEU OF

See BAIL.

DETINUE.

Lands were devised to trustees upon trust to pay a part of the rents and profits to the devisor's widow, and the rest towards the maintenance and education of his son till he reached 21, and after that time to him during the lifetime of his widow; after her death the property was devised to the son in fee.

The trustees defended suits respecting the trusts of the will, and in so doing incurred a debt to their attorney for costs, and deposited the title-deeds with him as a security for it. Held, that after the death of the devisor's widow, the son might maintain detinue against the defendant for the deeds without their being subject to any lien for the personal liability which the trustees had incurred by employing him. *Lightfoot v. Keane*, T. 1836. 1004

DEVISE.

A testator devised his real estate to trustees on trust that his daughter *M.* should, until she attained twenty-one, if unmarried, receive thereout an annuity of 60*l.*, and that she should thereafter and till she attained thirty-one, if unmarried, receive a further annuity of 40*l.*, but in case she should marry without the consent of his trustees, then she should only receive one annuity of 50*l.*, and the estate should, immediately upon such marriage, be in trust for all her children, under the limitations in the will; and for default of such issue then in trust for testator's sisters and the children of *S.*, one of them;—provided that if the daughter should marry with consent of the trustees, they might convey the estate to such persons as they should think fit, in trust for the husband and wife for their joint lives and the life of the survivor, with remainder to the chil-

dren of the marriage, under the limitations. *M.* having attained twenty-one married with consent of the trustees, and died without having had issue. Held, that the limitation in remainder to the testator's sister *S.* was conditional, depending on his daughter's marriage without consent; and failed on her marriage with consent. *Ann Tolderoy*, (widow of *James Bayley Tolderoy*) v. *Sir John Dutton Colt, Bart., William Davies, H. F. James, Jane Tolderoy, and six other children of the plaintiff and the deceased James Bayley Tolderoy*, H. 1836. 324

A testator, named *Spencer*, devised different houses and land to different persons, some being his collateral relations, named *Spencer*, and others his natural children, to some in fee and to others for life only; after which he, by a residuary clause, devised the residue of his lands, messuages, &c. not before disposed of, to his wife, her heirs, executors, administrators, and assigns for ever. He afterwards added these clauses just before he executed it. "I do further give to my wife this house wherein I now live; also the cottage, and all the buildings, cattle, and every thing belonging to me in and about the house, *Redvales*. I also entail my land to the *Spencer's* male heir so long as one shall remain." Held, that the devise to the wife of the residue of the land was not affected by the subsequent devise of *Redvales* to her for life, or to the *Spencer's* male heir, though the *Redvales* property was held by the testator *pur autre vie* only; and that the two clauses might both stand together, not being necessarily inconsistent; but that the last clause as to the entail of the devisor's land, was either unintelligible or inapplicable to the *Redvales* property devised to the wife.

Where a clause in a will is struck through by the testator before the will is executed, the erasure can only be noticed as a fact, and the will must be read as if the clause had never been in it. *Doe d. Spencer v. Pedley and another*, T. 1836. 882

DISCLAIMER, 1065.

DISJUNCTIVE.

In pleading. 1000

DISTRESS.

A landlord is liable to an action on the case for an excessive distress, where the excess consists wholly in seizing crops growing, the probable produce of which is capable of being estimated at the time of seizure.

The measure of damages, however, is not the value of the crops beyond the amount which ought to have been taken, but the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take, with some compensation for the loss of the absolute ownership and power of disposition thereof; and if the tenant has replevied, a compensation for the additional expense and inconvenience of replevying to a larger amount. *Piggott v. Birtles and another*, E. 1836. 729

An action cannot be maintained for distraining beasts of the plough, where there is no other sufficient distress on the premises except growing crops; for a landlord has a right to resort to the subjects of distress which are immediately available to raise the rent by sale. *Ib.*

After a tenant had signed a written agreement, not under seal, for hiring premises at an annual rent, he was asked by the landlord how

he would like to pay his rent, he replied quarterly. Quarterly payments of rent were proved, the landlord having distrained for a quarter's rent, the distress was held illegal, as the original agreement was not altered, and no agreement of letting had been agreed between the parties. *Turner v. Day*, E. 1836.

A landlord who does not personally make or interfere in a distress is not liable to an action for the neglect of the broker employed by him to make it, in not giving to the party distrained a copy of the charges of the distress, according to 57 G. 3 c. 6., and a plea by a landlord sued for such neglect of broker, that the distress was made by his direction as landlord of demised tenements, and not personally by him, but by his broker, in that behalf, as such, made and conducted the distress for the defendant, that the defendant did not wise make or interfere in that the charges were the neglect of the broker, was held good, denying the defendant's negligence at all in the distress beginning to end. *Hart v. T.* 1836.

By 2 IV. & M. sess. 1. c. 5 the overplus produce of sale of distress, is directed to be in the hands of the sheriff, &c. for the owner's use. By *overplus* intended what remains after payment of the rent and reasonable charges, so that their reasonableness may be disputed in an action on the case for not leaving overplus in the hands of the sheriff, &c. *Lyon v. T. Pitt, and Standage*, E. 1836.

Seem, that payment to the broker to the plaintiff's authorized agent, of the balance remaining after paying the rent and

whole of his charges, is equivalent to paying it to the sheriff, &c. for his use, according to the statute; but where it was pleaded that the balance was so paid by the broker, and accepted by the plaintiff in full satisfaction of the plaintiff's cause of action for not leaving the overplus with the sheriff, it was held, that the payment to and receipt by the plaintiff's agent of the balance, without disputing the amount of the charges, were facts upon which that could not be laid down as law, without leaving it to the jury to say whether the plaintiff did accept such balance in satisfaction, and if not, whether the amount paid was sufficient to cover the real overplus due, after deducting the rent and reasonable charges of distress. *Lyon v. Tomkies, Pitt, and Standage*, E. 1836.

810

DISTRIBUTION.

Of issue in pleading. 515

DISTRINGAS.

A *distringas* will not be granted if it does not sufficiently appear that the defendant was at home or in the neighbourhood at the time the calls were made. *Williams v. Hosier*, E. 1836.

805

DOOR.

Breaking outer and inner. 688, &c.

DOUBLE RENT.

See *Thoroton v. Whitehead*. 313

EASEMENT.

By prescription.

See WATERCOURSE, and 375.

EJECTMENT.

By churchwardens. See that title.

A lessee for years who covenants to deliver up possession of the pre-

mises at the expiration of the term to the lessor, *his heirs and assigns*, is not estopped by such covenant from showing, after the death of the lessor, or the determination of the lease, that the lessor was only tenant for life of the property demised. *Doe d. Randle Chetham Strode v. Seaton and others*, M. 1835.

19

Where the parties are substantially the same, judgment recovered by the defendant in a former action of ejectment, may be given in evidence against the lessor of the plaintiff at the trial of the second ejectment. *Ib.*

In ejectment for lands and mines in *Cornwall*, the defendant cannot defend for tin-bounds containing a certain tin-mine, with a right and liberty to dig and search for tin within the same bounds; for an ejectment will not lie for a tin-bound.

The defence should be for a mine lying within certain bounds. *Doe d. Earl of Falmouth v. Alderson*, H. 1836.

543

A notice to a tenant by a landlord, under the 1 G. 4. c. 87. s. 1., signed "*A. B.* agent for the plaintiff," is sufficient.

So it is sufficient where it requires the tenant to appear and be made defendant and to find bail, "and for such purposes as are specified in the act of parliament," without stating those purposes. *Doe d. Beard v. Roe*, E. 1836.

870

An affidavit stated that a declaration in ejectment was served on a servant who was left in charge of the premises:—Held, insufficient to obtain judgment against the casual ejector, and the court refused even to grant a rule to show cause thereon. *Doe d. Read and others v. Roe*, E. 1836.

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A tenant of a farm gave a notice to quit, which by agreement of par-

ties was to stand for *Michaelmas* 1835. Some months before that period he offered to go on at a reduced rent. The landlord's agent wrote him a letter, stating that the lessor could only consent to his diminished offer of the rent for the year from *Michaelmas* 1835 to *Michaelmas* 1836, "provided he, the lessor, could not find a tenant for it at the rent it appeared to the agent to be worth by the 1st of *August*." Before that day one C. applied respecting the farm, and desired to see it, but was refused permission by the tenant to enter and view it, and made no offer of any rent for it. The tenant held over beyond *Michaelmas* 1835, and the landlord brought ejectment:—Held, that the action will lay, it being an implied condition that the tenant should suffer applicants to go over and view the farm, upon breach of which the parties were remitted to their original rights, and the defendant had no right to remain on the farm after *Michaelmas* 1835. *Doe d. Marquis of Hertford v. Hunt*, T. 1836. 1028

Previous to 1812 a person erected a house on wheels on a piece of waste land, which house was never removed. Before twenty years had elapsed he gave up possession to the occupier of the adjoining land, who held under a lease granted in 1812, and let the house to the defendant, who kept possession till 1835, when the owner of the adjoining land brought ejectment against the defendant:—Held, that the defendant was estopped from denying the title of the tenant, his immediate lessor, and that the latter could not dispute that of the landlord. *Doe d. Wheble and another v. Fuller*, M. 1835. 17

See LANDLORD AND TENANT.

ELECTION EXPENSES

See *Thomas v. Edwards*.

ERASURE.

See DEVISE.

ERROR.

The common joinder in error and special assignment of error must not be signed by counsel. *bold v. Smith*, T. 1836.

It is no ground of error that the writs of *venue vobis* and *distringas* are annexed with only one part annexed to both, for the court intend that it has been severally annexed by the sheriff to one and the other writ. *Id.*

ELEGIT.

It will be referred to the master to take an account of the rents and profits of land received by the plaintiff under an *elegit*, and to make such allowances as a court of equity would do, so as to bring the defendant into possession of the debt and costs should have been paid, without bringing in a writ of *scire facias ad compedum et rehabendum terram*. *bank v. Myers*, T. 1836.

ESTOPPEL.

See EJECTMENT.—LANDLORD AND TENANT.

ESTREAT.

Notice of a motion to discharge an estreated recognizance should be given to the attorney-general, whether the estreat in question has been in fact granted by the crown by charter or not. *the matter of the estreated recognizance of Peter Morris of St. Master Mariner*, E. 1836.

EVICTION.

See *Price v. Williams*.

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EVIDENCE.

Covenant on a mortgage deed.

Pleas: *non est factum*, and that the deed after its execution had been fraudulently altered by *A.*, one of the attesting witnesses, by increasing the amount of the mortgage money from 700*l.* to 800*l.* On the deed being produced, its execution by the defendant appeared to be attested by *A. & B.* *A.* being dead, *B.* was called, who stated he had no recollection of having witnessed the deed, and doubted whether his own signature and that of the defendant were genuine. The handwriting of *A.* and the defendant were thereupon proved by other witnesses:—Held, that declarations of *A.* tending to prove that he had either forged or fraudulently altered the deed, were not admissible in evidence on the part of the defendant. *Stobart and others (Executors of William Stobart) v. Dryden*. T. 1836. 899

In debt for goods sold and delivered, the defence, that the goods were sold on a credit not expired at the time of action brought, is open to the defendant on the general issue, *nunquam indebitatus*.

Broomfield v. Smith, T. 1836. 929

Lessor of plaintiff in ejectment being lessee for years of a house, let it to defendant at a quarterly rent, defendant agreeing within three calendar months to erect a shop front; it being further agreed that if he did not so erect it within that time, it should be lawful for the lessor of plaintiff or his agent to retake possession of the premises, and the agreement should be *null and void*. Defendant immediately took possession, enlarged the ground-floor windows,

made some other small alterations within the three months, and opened the house as an eating-house. The plaintiff brought ejectment for a forfeiture in not erecting a "shop front." After the alterations had been made and after the first quarter's rent had become due, but before the ejectment was served, the lessor of the plaintiff being ill, his son, who lived next door to the demised premises, called on defendant for the rent. Defendant said he would pay it if the son would indemnify him against a sum which he had paid for an increased rent due to the original lessor of the premises for carrying on a trade there. The indemnity was not given and the rent was not paid. At the trial the defendant offered in evidence the original lease of the premises, imposing an increased rent on the lessee, by way of penalty, if he suffered a trade to be carried on there, so as to explain the word "shop-front" as used between lessor of plaintiff and defendant, and to show that it was not used in its ordinary sense. The judge rejected the evidence as *res inter alios acta*, and left it to the jury whether defendant had erected a shop-front, which they found he had not:—Held, that the lease was properly rejected, and that the proviso that the agreement should be "null and void" if the shop-front was not erected in the time fixed, made it not void but only voidable at the option of the lessor. *Doe d. Nash v. Birch*, E. 1836. 769

Held also, that as it did not sufficiently appear that the son of lessor of plaintiff had authority from his father to waive the forfeiture, or that the father had notice of the nature of the alterations going on before he authorized the son to demand the rent,

which became due after the alterations were made, the question whether the forfeiture was waived by that demand did not arise; but *semble* by *Parke B.*, had the son's authority been sufficient the demand would have amounted to a waiver. *Doe d. Nash v. Birch*, E. 1836. 769

EXECUTOR.

Where an executor having called the legatees together, and after exhibiting accounts of the assets and his disbursements, paid to several the sums due, and retained the legacy payable to one of them who was absent, charging himself in his account with the amount so retained:—Held, that he was liable to the legatees in *assumpsit* for so much money had and received, and on the account stated. *Hart v. Minors*, T. 1836. 990

If an executor who is sued as such for a debt of the testator, plead to the action, but does not plead *plene administravit*, and has judgment against him, that judgment is evidence of a *devastavit*; and if after a return of *nulla bona testatoris* by the sheriff of the county in which the action is laid, a writ of *scire fieri* inquiry issues to another sheriff, who returns *nulla bona testatoris*, notwithstanding the judgment is given in evidence on the inquiry without any evidence for the defendant, that the assets admitted on the pleadings to exist at the time of the judgment, have been legally administered since, the court will quash the return, and award a new *scire fieri* inquiry. *Palmer v. Waller and another, Executors of Waller*, T. 1836. 1014

EXECUTORS AND ADMINISTRATORS.

The court will not interfere to relieve an executor or administrator

from costs, under 3 & 4 42., on his failure in a brought by him, merely he acted *bond fide* and had apparent grounds for pro the suit, but only when so conduct on the part of the ant, or other very peculiar, of interference are shown. *son, administrator of Millin Freeman*, M. 1835.

EXPIRED LEASE.

Its effect.

FALSE IMPRISONMENT.

FALSE REPRESENTATION.

See *Lyde v. Barnard and G. Button*.

FELON CONVICT.

Conveyance of land by

See *ATTAINDER*.

FLOWERS.

FORCIBLE ENTRY.

FORFEITURE.

See *ATTAINDER*.

FORGERY.

Of a deed.

FRAUD.

See *PLEADING*.

FRAUDS.

A. being a tenant of a close under *B.*, and *C.* being tenant of another close under *D.*, agreed with writing to exchange closes, and pay each other's rent. Each possession of the other's close suant to such arrangement, was assented to by *E.*, who the steward of both the landlords.—Held, that the transaction a substitution of *A.* as tenant

the place of *C.*, whose interest was surrendered by operation of law.

(29 *Car.* 2. c. 3.) *Bees v. George Williams and another*, M. 1835. 23

A declaration stated that *H.* was employed to do work on certain houses, and that defendant was employed as surveyor over him, and to receive monies to be paid to *H.* for such work, and that in consideration that the plaintiff would provide and deliver to *H.* such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such monies received by him as should become due to *H.* for the work, if *H.* should give him an order for that purpose. Averment, that *H.* gave such order to the defendant, and required certain materials, which the plaintiff delivered to him, to the value of 1000*l.*, and that that sum became due to *H.* for his work; of all which premises the defendant had notice, and was requested by plaintiff to pay him for the materials out of such monies received by him as were due to *H.* for the work. Breach, that although the defendant had received 1000*l.* to be paid and then due to *H.*, and though the said order had not been revoked, the defendant refused to pay the plaintiff. Plea, that the promise in the declaration was a special promise to answer for the debt of *H.*, and that there was no memorandum or note thereof in writing:—Held, on demurrer, that the defendant's promise was original and not collateral, so as to require to be in writing, under the statute of frauds, 29 *Car.* 2. c. 3. and that the plaintiff was entitled to recover. *Andrews v. Smith*, M. 1835. 173

GENERAL ISSUE.

See PLEADING.

GOODS SOLD AND DELIVERED.

An insolvent shopkeeper assigned his stock and business to his brother, and compounded with his creditors at 5*s.* in the pound, of which his brother was to pay half and himself the rest. The brother's name was placed over the door, and his wife sometimes went there, but insolvent and wife continued to manage the business of the shop for him. The brother paid his share of the composition. One of the insolvent's creditors went to him at the shop and pressed him to pay 11*l.*, his share of the composition. Insolvent offered him in payment a bill of exchange for 25*l.*, on which his brother's name had been indorsed without his authority. Insolvent and his brother's wife then also proposed to the creditor that he should supply goods to the amount of the balance due. Upon this the creditor agreed to the terms, took the bill and sent in goods to the shop accordingly. The bill being dishonoured, the solvent brother was sued on it, and also for goods sold and delivered, but had a verdict on two pleas—that he never indorsed the bill, and that no notice of dishonour had been given him. However, evidence having been adduced on the count for goods sold and delivered, that the solvent brother had declared himself responsible for all orders "given at that shop," the jury found that the insolvent had a general authority to buy goods for his brother, and that the plaintiff sold his goods on the credit of the latter, as well as of the bill:—Held, that plaintiff was entitled to recover the value of the goods. *Rose and others v. John Edwards*, T. 1836. 975

The plaintiff agreed to "lend or let" the defendant a musical snuff-box,

on the understanding, that if it were damaged the defendant was to pay for it, and 3*l.* 10*s.* was fixed upon as its value. The box having been damaged while in the defendant's possession, the plaintiff refused to take it back, and brought an action for goods sold and delivered, to recover the 3*l.* 10*s.*:—Held, that the action might be maintained. *Bianchi v. Nash*, T. 1836. 916

See VENDOR AND PURCHASER.

GROWING CROPS.

See DISTRESS.

HIGHWAYS.

See ASSUMPSIT.

HIRING.

The plaintiff served the defendant as an assistant surgeon for 161 days, when falling ill he went to an hospital for three months, and on his leaving it neither returned to the service nor was requested by defendant to do so. No specific contract of hiring appeared. Payments had been made to the plaintiff on account of wages during his service, but were of various amounts, without reference to any distinct periods of a year, or to any fixed compensation payable at the end of it:—Held, that if there was any evidence of a hiring, it did not amount to a general hiring, and consequently of a hiring for a year, but that it showed a contract to pay such wages for the plaintiff's services as they should be worth, and that the plaintiff was entitled to recover accordingly *pro ratâ*. *Bayley v. Rimmell*, E. 1836. 806

HOLIDAYS.

At law offices.

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HUSBAND AND WIFE.

A married woman, living apart from her husband in adultery, accumulated monies which she deposited in bankers. She then married a second husband, her first husband being still living, and on such marriage settled the money so deposited for the benefit of herself and her second husband and two illegitimate children. Shortly afterwards she was convicted of murder and executed. Previous to the trial she and the trustees applied to the bankers for the fund, in order to employ it in her defence, which the trustees refused to do. The trial was conducted in an extravagant manner, but the bankers refused to pay it over. After her execution the trustees and the first husband severally brought actions against the bankers to recover the money, which were staid under an issue under the plea of the first husband, and an issue was directed to try the question between the first husband and the trustees, under which a verdict was found for the first husband:—Held, on application for new trial, that the plaintiff was entitled to the money. *Blithyn and another*, M. 1836. 806

Held also, secondly, on show of cause against a rule for payment over the money to the plaintiff, that the bankers should be allowed their costs out of the fund, which were to be retained by them until paying it over to the plaintiff. S. C.

Thirdly, that the trustees, having acted *bonâ fide*, should pay the costs of the bankers to the plaintiff, and also pay all the costs incurred by him in the course of the proceedings. S. C.

Semble, that if they had acted *bonâ fide*, they would not only have been charged with such costs, but possibly might have been allowed their own costs out of the fund. S. C.

INDEBTED.

As to this word in affidavit to hold to bail. 662
 Meaning of, in a declaration 878

INDEMNITY.

See *White v. Ansdell*. 785

INFANT.

The defendant had obtained a rule nisi to set aside a warrant of attorney dated the 1st of *August* 1835, on his own affidavit, that when he gave it "he was an infant of the age of 20 years or thereabouts," and on proof of his register of baptism dated the 3d of *September* 1815. The court discharged the rule, holding that the infancy had not been sufficiently made out. *Weaver v. Stokes*, H. 1836. 512

See **APPEARANCE.**

INSOLVENCY.

A party, on taking the benefit of the insolvent act, swore that certain goods, described in her schedule, belonged to the creditors of her deceased husband, but afterwards brought an action to recover them, claiming them as her own: Held, that the fact of her so swearing, and afterwards setting up a right to the goods in herself, was an inconsistency for the consideration of the jury; but that such oath did not estop her from asserting her claim. *Thornes v. White*, M. 1835. 110

Where *A. & B.* entered into a written agreement, the one to purchase and the other to sell all the salt made at the salt works of *B.* for 14 years; but it was provided that bankruptcy or insolvency on the part of *A.* should terminate the contract: Held on demurrer, that the word "insolvency" was used in its natural and not in its artificial

sense, and that the contract was put an end to by *A.* being unable to pay his debts, although he had not taken the benefit of the insolvent act. *Parker v. Gossage*, M. 1835. 105

INSOLVENT.

In order to support a security made by an insolvent to a creditor within three months before he is committed to prison, the latter need not prove pressure of the insolvent by him. It is for the assignees of the insolvent, who seek to avoid the security under 7 Geo. 4. c. 57. s. 32. to make it out to be the voluntary act of the insolvent. *Doe on demises of Lamb and others v. Gillet and another*, M. 1835. 114

An action by an attorney for his charges incurred in selling or mortgaging the property of a party confined in prison for debt, after such party has petitioned the insolvent court for his discharge, cannot be resisted on the ground that such sale or mortgage was fraudulent as against the creditors of the insolvent. The only ground, as it would seem, on which such an action can be defended, is, that the insolvent could derive no benefit from the plaintiff's skill. *Tabram v. Warren*, M. 1835. 153

INSPECTION OF LEASE.

Where a lease is executed by both the landlord and tenant, the lessor not having a counterpart, is entitled, on bringing ejectment for a forfeiture, to demand an inspection and copy of the lease from a mortgagee to whom it has been assigned by way of mortgage. *Doe dem. Morris v. Roe*, H. 1836. 545

INSURANCE.

Where, in an action on a policy of insurance, the loss was laid by perils of the seas, and the insurer

pleaded unworthiness of ship at the commencement of her voyage, *semble* that the ship must be taken *prima facie* to be seaworthy, and that it lay on the insurer to prove the contrary. But where the insured gave evidence of seaworthiness, and that during rough weather on a short voyage a leak was sprung, which increased on the crew so that they finally abandoned the ship, and no contrary evidence was adduced by the defendant, the court refused a new trial, after a verdict for the plaintiff for the value of the goods on board, on the ground that the finding of the jury that she was seaworthy when she sailed, but was abandoned too soon, was equivocal, no objection having been taken at the trial on that ground. *Franco v. Natusch*, H. 1836. 401

Semble, a policy on "goods valued at 1400*l*." is a valued policy; without stating the particulars of goods valued. *Ib.*

The onus of proving deviation lies on the insurer. *Ib.*

A party, on insuring her life, made false representations as to her object in effecting the insurance, and also as to her having obtained similar insurances from other offices, both of which facts were found by the jury at the trial to be material to be known by the insurance company. Held, that the policy was thereby avoided, although such false representations were in answer to parol inquiries not comprised in the list of printed questions required by the regulations of the office to be asked of the assured; and although the policy, as framed, was only to be void on false answers being given to such printed questions. *Wainwright, executor of Abercromby, deceased, v. Bland and others*, H. 1836. 417

Quære, whether a party may insure his own life for the benefit of

another, who provides the to pay the premiums. *Ib.* See *Porter v. Izatt*.

INUENDO, 576.

See SLANDER.

IRELAND.

Ireland is still a place "beyond seas," within s. 19 of 4 & c. 16. so as to entitle a plaintiff to commence his action within years after the defendant's return from thence to *England* withstanding the first article act of union, 39 & 40 Geo. 3 s. 3., and the law amendm 3 & 4 Will. 4. c. 42. s. 7., making *Ireland* not to be "seas," within the meaning act, or of 21 J. 1. c. 16, (st limitations.) *Lane and Bennett*, H. 1836.

Affidavit of debt in.

IRREGULARITY.

Reg. Gen. Hil. 2 Will. 4. No. 1 vents an application to set proceedings for irregularity within a reasonable time, or a fresh step taken by the plaintiff. Held, that entering appearance by the plaintiff defendant, was not such a step as would prevent him from objecting to an irregularity in the copy of the writ. *Chalkley v. Carter*, M. 1835

A declaration against one defendant who has been arrested *in capias* issued against such defendant and another, is irregular.

The defendant in vacation set aside a summons at chambers on the declaration for irregularity, which was dismissed by the judge, who refused to set aside the proceedings in order to afford the defendant an opportunity of appearing to the court, but granted time to plead, which was refused.

under successive summonses, until the commencement of term : Held, that there was no waiver of the irregularity. *Woodcock v. Kilby*, H. 1836. 301

Signing judgment too soon for want of joinder in demurter. 427

ISSUE.

Triable before sheriff, form of. 1135

JUDGMENT AS IN CASE OF NONSUIT.

In order to be enabled to use the issue in supporting a rule for judgment as in case of a nonsuit, the affidavit must refer to it, and the rule be drawn up on reading it. See *Reg. Gen. Hil. 2 W. 4. No. 70.*

Meredith v. Stocker, M. 1835. 76

After writ of trial. See *Day v. Day*, 314

In discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking, the court will order payment of the costs of the day, "if any," although it is not shown by the defendant's affidavit that any costs have been incurred.

But it is otherwise where it appears on the defendant's affidavit that no costs could have been incurred, as where a countermand of notice of trial was given in due time. *Doe dem. Humphreys v. Owen*, E. 1836. 944

Although by the rule of *H. T. 2 W. 4. s. 108.* the plaintiff may, where he takes issue on the defendant's pleading, add the *similiter* without ruling the defendant to rejoin, if he does not do so the defendant must add the *similiter* to entitle himself afterwards to move for judgment as in case of a nonsuit. *Brook v. Lloyd*, T. 1836. 924

See WRIT OF TRIAL.

JUDGE AT CHAMBERS.

See AFFIDAVIT—WRIT OF TRIAL.

JUDGE'S ORDER.

Drawing it up. 70

JUSTICES.

Costs in actions against. 464

LANDLORD AND TENANT.

Previous to 1812 a person built a house on a piece of waste ground, and before acquiring a title to it gave up possession to the tenant of the adjoining land, who held under a lease granted in 1812. The latter let the premises to the defendant. Held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord. *Doe on the several demises of Wheble and Kinner v. Fuller*, M. 1835. 17

Disputing landlord's title. See *Doe d. Wheble v. Fuller*, 17. *Doe d. Strode v. Seaton*, 19.

An outgoing tenant claimed an allowance from his landlord under the custom of the country for labour bestowed in tilling and sowing a certain portion of the land within the last year of his tenancy. The outgoing tenant had held the land for several years after the expiration of a lease, without coming to any fresh agreement. The lease contained a covenant by the tenant to spend and consume on the demised premises three parts out of four of the straw arising from them, and to leave the manure there at the end of the term to and for the use of the lessor, he paying the full price for the same. Held, that the tenant must be taken to have held under the terms of the expired lease as far as they were applicable to a tenancy from year to year; and that the stipulation in it, as to leaving the manure at the

end of the term, did not exclude parol evidence of the custom of the country allowing the tenant for tillages and sowing claimed; and that that custom was imported into the lease by implication. *Hutton v. Warren*, clerk, E. 1836. 646
Notice under 1 G. 4. c. 87. see 870

LEASE.

Certain premises were demised to *M. E.* and her heirs, *habendum* to her and her heirs, for and during the natural lives of her son *J. E.*, her daughter *M. E.*, and her son *Alexander's* grand-daughter, and the life of the survivor of them. *Alexander* had no grand-daughter at the time of the execution of the lease, but had several subsequently. Held, that the lease determined on the death of the survivor of *J. E.* and *M. E.* *Doe d. Pemberton and others v. Edwards*, T. 1836. 1006
Inspecting lease 545

LEGACY DUTY.

A testator by his will directed his executors to invest the residue of his personal estate in the funds, and divide the interest "among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they should see fit."

Held, that the executors could not be called upon to pay legacy duty in respect of such residue. *The Attorney-General v. Nash and others*, H. 1836. 584

LIABILITIES. See 863.

LIBEL.

Where the plaintiff, who was a minor and a party to a suit in equity, was desirous of changing the solicitor employed, and such solicitor having notice of his in-

tention wrote a letter to the plaintiff's next friend, who was answerable for the costs of the suit: It was held that the letter was a privileged communication, though it alleged that the plaintiff who had been apprenticed to a civil engineer, had had a present made him of his indentures, because he was worse than useless in his office. *Wright v. Woodgate*, M. 1835. 1

LIEN.

A declaration stated that the plaintiff had bought of *C.* and son certain goods for a sum mentioned, which the defendant had lent the plaintiff on his personal credit without agreement for any lien on them in respect thereof, which sum the plaintiff paid to *C.* and son, who accepted it in payment for the goods: yet the defendant falsely and wrongfully pretending that he was entitled to such lien and had a right of preventing delivery to the plaintiff till the said loan should be repaid, wrongfully and maliciously, and without any reasonable or probable cause in that behalf, but under colour of the said pretended lien, ordered *C.* and son not to deliver the said goods to the plaintiff, but to keep them till they received further orders, in consequence whereof *C.* and son refused to deliver them to him. Plea, that plaintiff never paid *C.* and son. Held, on demurrer, that the action was maintainable, for after putting the averment of payment which had been traversed out of consideration, it appeared sufficiently that the defendant knew that there was no agreement for a lien on the goods and that there was no obligation on *C.* and son to deliver the goods to the plaintiff without payment and that their refusal so to deliver the goods to the plaintiff arose from the defendant's statement.

and the damages directly resulted from that act of his. *Green v. Button*, M. 1835. 118

LIMITATIONS, STATUTE OF.

Though a verbal acknowledgment of part payment of a debt, or of payment of interest thereon, is insufficient within 9 G. 4. c. 14., to take the case out of the statute of limitations; yet if the payment of a sum of money within six years is proved as a fact, and not by a mere admission, its appropriation to a particular account, whether in respect of principal or interest, may be shown by declarations of the party making the statement, which need not have been made at the time of such payment. *Waters and others, executors, v. Tomkins*, M. 1835. 137

Plea of the statute of limitations must conclude with a verification, and where it concluded to the country, and plaintiff added a similitur, on which the cause went to trial, the court ordered a new trial for want of a correct issue joined, both parties amending without payment of costs. *Wheatly v. Williams*, T. 1836. 1044

See ACCORD AND SATISFACTION—
DEVISE.

LORDS' ACT, 32 G. 2. c. 28.

In order to bring up a prisoner under the compulsory clause of the Lords' Act, 32 G. 2. c. 28. the twenty days notice to which he is entitled under s. 16. must expire before the first day of the next term in which he is to be brought up. Therefore a notice served on a prisoner on the 13th October is too late to bring him up within the first seven days of Michaelmas term, for, after excluding the day of service (13th October), it did not expire till and on the first day

of it, viz. 2d November. *Buxton v. Spiers*, M. 1835. 74

Semble, the mode of calculating the number of days in any notice provided by a statute, is the same as that prescribed for the same purpose by *Reg. Gen. Hil. 2 W. 4. No. VIII.* in matters affected by the rules or practice of the courts. *Ib.*

MALE HEIR.

See DEVISE.

MATERIALS FOUND.

See WORK AND LABOUR.

MEMORANDA, 232.

MERCANTILE USAGE.

How proved. 820

MINE, 543.

MINER'S JURY, 746.

MISREPRESENTATION.

See REPRESENTATION.

MORTGAGE.

An estate was put up and sold by auction for 15,500*l.*, and a deposit was paid on that sum, but by the conditions of sale the estate was made subject to an apportioned mortgage debt of 10,200*l.*, which was to be paid off by the purchaser when it became due. The mortgagee did not concur in the sale, and the sum received by the vendor was 5,300*l.*, being the balance of the 15,500*l.* after deducting the mortgage. Held, that this was a sale only of the equity of redemption by the mortgagor for 5,300*l.*, on which sum alone the auction duty was chargeable. *Rex v. Sedgwick*, M. 1835. 94

NEW ASSIGNMENT.

Withdrawing plea to. 1131

NEW TRIAL.

A rule for a new trial will not be granted on affidavits alleging that a material witness has been prevented from attending the trial, without showing grounds for a belief that the successful party is implicated in such misconduct, but merely a belief that he has been kept away at his instance.

Marsh v. Monckton, M. 1835. 34

Where in an action tried under a writ of trial upon a promissory note for two guineas, in which the requisites of the statute 17 Geo. 3. c. 30. had not been complied with, the under-sheriff directed the jury to find for the defendant, and the jury brought in their verdict "We find that the money is due, but that there is an informality in the note." Held, that if the verdict were not so clear that it could be entered for the defendant, that it amounted to a perverse verdict; and a new trial was granted, although the sum was under 5*l.* *Owen v. Pugh*, M. 1835. 26

Order in which arguments in new trials are taken in term. 877

See **COSTS.**

NON ASSUMPSIT.

Giving special agreement in evidence on. 634

NOTICE OF ACTION.

See **CONSTABLE.**

NOTICE.

Calculating days in. 74

NOTICE OF TRIAL.

See **TRIAL.**

NUISANCE.

Action for. 721

NUNQUAM INDEBITATUS.

Plea. 929

OFFICE AND OFFICER.

See **VESTRY.**

A bond was given for the faithful performance of the office of collector of parochial rates appointed under a local act of parliament by trustees who were a fluctuating body, one-third going out every year; the act providing that such collector should hold his office no longer than until the next meeting of the trustees after the next annual day of election of trustees at which he was capable of being re-elected. The condition of the bond was, "if the said P. do and shall from time to time and at all times hereafter, during such time as he shall continue in his said office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority or with the consent or acquiescence of the said trustees or their successors, to be elected in the manner directed by the said act &c., duly &c., execute &c. the said office, and use his best endeavours to collect &c. the rates &c., during the present or in any subsequent year, &c."—Held, that the obligation of the bond was not limited to the year or period for which the collector was originally appointed, but extended to all subsequent years during which he continued to hold the office. *Augero v. Keen and another, executors of George Keen, deceased*, E. 1836. 709

OFFICE COPIES.

See **AFFIDAVITS.**

OUTLAWRY.

Where a defendant was abroad when an exigent in outlawry was awarded, the outlawry was reversed on payment of costs and putting in bail in the alternative in the original action. *Levi v. Claggett*, T. 1836. 937

OYER.

In an action on a bail-bond the defendants had obtained time to plead under two several judge's orders until the 11th November, upon the usual terms of pleading issuably and taking short notice of trial. On the 10th they demanded oyer of the bond, and on the 11th pleaded that the sheriff did not assign it:—Held, first, that by pleading a plea beside the bond, they had not waived their right to demand oyer of it; and secondly, that such right was not waived by obtaining time to plead; and the court ordered that the plaintiffs should grant oyer of the bond, and that the defendants should have as much time after oyer to plead to it as they had unexpired when the demand of oyer was made. *Goodricke and another, assignees, v. Turley and others*, M. 1835. 149

PARTICULARS OF DEMAND.

Where a plaintiff avers, by way of special damage to him by the defendant's breach of agreement, that he the plaintiff has sustained certain expenses, he need not furnish particulars of the special damage. *Retallick v. Hawkes*, T. 1836. 1134

A particular of demand stated the action to be for the amount of stakes deposited by the plaintiff and one R. with the defendant, and won of R. by the plaintiff:—Held, that the plaintiff could

not, under such particular, recover the amount of his own stake, on proof that he had re-demanded it from the defendant before it was paid over. *Davenport v. Davies*, T. 1836. 931

The court will not compel a plaintiff in his particulars to furnish an account of the sums received by him from the defendant, but only to state the balance for which he is proceeding. *Penprase v. Crease*, H. 1836. 468

See *Thoroton v. Whitehead*. 313, 606

PARTNERS.

See CONTRIBUTION.—PLEADING.—TROVER.

PAYMENT.

Quære, if evidence of payment either before or after action brought, can be given in evidence in debt or assumpsit under the general issue in reduction of the damages. *Wright v. Skinner*, M. 1836. 277

In support of a plea of payment, the defendants proved the payment of 11*l.* to H., the plaintiff's attorney, on the plaintiff's account. To rebut this evidence, the plaintiff proposed to call the attorney, to prove that the defendants, who paid the money, afterwards came to him and got it back, but he was rejected as being incompetent, and the defendants recovered a verdict:—Held, that the witness was competent, and his evidence should have been received. *Bowers v. Evans and another*, H. 1836. 572

A plea of payment must conclude with a verification. *Goodchild v. Pledge*, E. 1836. 638

Cotemporaneous with purchase, whether subject of plea of payment. 878

Where in assumpsit, to which the only plea was *non assumpsit*, it appeared at the trial that a sum of money had been paid to the plain-

tiffs after action brought, the court on motion after verdict (the payment not being denied) allowed the damages to be reduced by the sum paid. *Richardson and Wife v. Roberts*, E. 1836. 762

Quære, if evidence of payment either before or after action brought, is admissible in evidence in reduction of damages? *Ib.*

PAYMENT OF MONEY INTO COURT.

A defendant may pay money generally into court upon several breaches or counts, and plead such payment in the form given by the rule of court of H. T. 4 W. 4. r. 17., without specifying how much is paid in respect of each breach or count. *Marshall v. Whiteside and Eleanor Victorine his Wife*, E. 1836. 485

In an action brought to recover 21*l.* 1*s.* the defendant took out a summons to stay proceedings on the payment of 12*l.* 12*s.* 6*d.* into court. The plaintiff having refused to accept that sum, the judge before whom the summons was heard, made an order that the defendant should be at liberty to pay the money into court, and if the plaintiff should recover no more, that the defendant should not be liable to costs from that time. The defendant afterwards offered to pay 15*l.* and costs, in order to settle the action. The plaintiff subsequently signed judgment twice for want of a plea; both of which judgments were set aside for irregularity. The defendant having pleaded the payment of the money into court, the plaintiff the next day took the money out, and gave notice to tax his costs, and two days afterwards delivered a replication, whereby he accepted of the money paid into court in full satisfaction of his debt. The defendant having obtained a rule

nisi why the defendant's subsequent to the summons pay the money into court, should not be allowed and set off against the costs of the plaintiff in court, on cause being shown, not lay down any general rule of practice, but under the particular circumstances of the case charged the rule in question.

Per Parke B.—It is *prima facie* vexatious in a party to pay money into court, and afterwards to take it out, and be made to pay all the subsequent costs, unless he shows cause of exemption. *Widdall v. Darke*, H. 1836.

PAUPER.

See Costs.

PEREMPTORY UNDERTAKING.

Where in an action for a libel the defendant gave a peremptory undertaking that the libel was enlarged, and just before the cause was called on, at the sittings after Trinity term, the counsel for the plaintiff left the court, upon which the plaintiff's attorney being taken by surprise, and obliged to act on the emergency, withdrew the record from the court in Michaelmas term, and enlarged the peremptory undertaking to try till the sittings that term. *Pierce v. Williams*, 1835.

PLEADING.

On bills and notes. See BILL NOTES.

The case of *Wheeler v. Haydon*, Jac. 328. 2 Bulst. 83. and B. 135. merely decides that a lease is the incumbent of a benefice, whatever terms it is framed, and is in point of law as a lease so long only as he continues incumbent: for he could not

greater interest. But a contract by an incumbent to demise for a term is broken by his resignation of the benefice before the end of the term.

A declaration stated that the defendant being a vicar seised in his demesne as of freehold of his glebe, cottages, and vicarage houses, agreed to set and let the same to the plaintiff, to hold to him from a subsequent day, for the term of fourteen years, at and under a yearly rent named, payable half-yearly. A lease was to be drawn, prepared, and executed by and between the landlord and tenant, if required by either of them, at the sole expense of the landlord.

Breaches; first, that the defendant neglected to procure a lease to be executed to the plaintiff; and, secondly, that the plaintiff resigned the vicarage, and that another incumbent being inducted, evicted the plaintiff. Held, on demurrer, that the contract was well pleaded, without stating whether the legal effect of it was to operate as a present demise or not; and that after the lessee had demanded a lease, it was to be prepared by the lessor, and not to be tendered by the lessee. *Price v. Williams*, M. 1835.

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A breach was so laid in a declaration as to make it doubtful whether it was laid as a breach of the agreement declared on, or as special damage only. Another breach was well pleaded. Held, that a demurrer to the whole declaration was too large. *Ib.*

If assignees of a bankrupt or insolvent declare in debt, so as to make it sufficiently appear that they are assignees, it is not requisite to allege that they sue "as assignees." *Fergusson and another, assignees; v. Mitchell*, M. 1835.

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Assignees may sue in the debt as well as the detinet, though executors cannot. *Ib.*

The omission of the queritur in debt is immaterial. *Ib.* And see *Edwards v. Bowman*, 4 Tyr. 412.

The assignees of an insolvent declared in debt that the defendant was indebted to the insolvent *before* he subscribed his petition, or executed the assignment of his estate, under the insolvent act, 7 Geo. 4. c. 57. for goods sold and delivered by him "before he became insolvent:"—Held, that the time when the debt accrued was sufficiently pleaded. *Fergusson v. Mitchell*, M. 1835.

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In a count on an account stated, the time when it was stated should be shown, or it will be bad on special demurrer. *Ib.*

If a plaintiff is entitled to recover on a part of his declaration, whether consisting of one or more counts, a demurrer to the whole is too large, and entitles him to judgment on the whole record. He may release his damages as to the defective part. *Ib.*

The replication of *de injuriâ* is proper in assumpsit where the plea admits a breach of promise, and contains only matter of excuse.

Where in an action on a bill of exchange it is pleaded that the bill was obtained by fraud, to which *de injuriâ* is replied, the defendant will be allowed at the trial, after proving the fraud, to throw the onus upon the plaintiff of showing consideration. *Isaac v. Farrar*, H. 1836.

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Assumpsit for money had and received. Plea of S. one of the defendants, as to 25*l.* parcel &c., that he and M. were carrying on, in partnership, the business of omnibus proprietors, and that while they were such partners, the plaintiff deposited with them 25*l.* as a security for faithfully accounting for the moneys received by him as their servant. That the partnership between S. and M. was afterwards dissolved by consent; and

upon such dissolution it was agreed between them that S. should take upon himself the payment of certain of the debts due from them, and retain in his sole employ certain of the servants; and that M. should take upon himself the payment of other part of the debts, and retain in his sole employ others of the servants. That M. in pursuance of the agreement took upon himself the payment to the plaintiff of the 25*l.* deposited by him with the defendants, and retained plaintiff in his sole employ. The plea then averred, that the plaintiff had notice of all the premises, and assented to the last-mentioned agreement, and to the undertaking and retainer of M.; and in consideration of the premises discharged S. from the 25*l.*

Replication, that M. did not retain the plaintiff in his sole employ, nor had the plaintiff notice of all the premises, nor did he assent to the last-mentioned undertaking and retainer of M. or discharge of S. from the 35*l.* At the trial the defendant S. obtained a verdict on this issue.

The court made a rule absolute for entering judgment for the plaintiff, *non obstante veredicto*, on the ground that the plea disclosed no agreement making M. solely liable to the plaintiff in respect of the 25*l.*; and, consequently, that there was no consideration for the discharge of S. *Thomas v. Skillibeer and Morton*, H. 1836. 290

A count for goods sold and delivered, stating that the defendant on a certain day was indebted to the plaintiff in &c. for goods sold and delivered by the plaintiff to the defendant at his request, but not alleging any time when the goods were sold and delivered: Held good, on special demurrer. *Lanc v. Thetwell*, H. 1836. 352

Assumpsit for goods sold and deli-

vered. Plea, as to part of the goods mentioned in the declaration that they were sold and delivered by the plaintiff to the defendant in pursuance of a contract then made between them; afterwards, and before the commencement of the suit, it was agreed between the plaintiff and defendant, that the said contract should be wholly rescinded, and was rescinded according to demurrer, the plea was allowed on the ground that the defendant was not bound under the contract of sale for delivery of the goods, or to be got rid of either by a rescission or by an accord and satisfaction. *wards v. Chapman*, H. 1833

Assumpsit for money paid. Plea, first, that the money was paid for the defendant's use in respect of one sixteenth share of the loss of certain goods and costs recovered in an action which was brought by certain parties against the plaintiff, they complained against the plaintiff as the owner of a vessel, the defendant was a part-owner to the extent of one-sixteenth of the loss of certain goods shipped on board of the vessel to be carried from A. to B. which loss was alleged in the action to have happened through the negligence of the plaintiff and his servants. The defendant then averred, that the said loss was wholly caused by the negligence of the plaintiff by his servants, and that the same happened through the personal misconduct of the plaintiff; and secondly, that the defendant was the legal owner of a sixteenth part of the vessel at the time that the goods were shipped, and continued to be such owner when they were lost, yet he did not cur with the plaintiff and other part-owners of the said vessel in the employment thereof on

voyage, but that the said voyage was undertaken for the advantage and at the risk of the plaintiff and certain other persons, and without the defendant being concerned in the adventure.

Held, on special demurrer, that both of the pleas were bad, as they amounted to the general issue.

Gregory v. Hartnoll, H. 1836. 803
A count in debt on the 11 Geo. 2. c. 19. s. 18. for double rent of premises held over by a tenant after giving notice to quit, may be joined with a count for use and occupation of the same premises, during the same period. *Thoroton and others v. Whitehead*, H. 1836. 313

The plaintiffs, by their particulars, restricted their demand to the first count. The court refused a rule to strike out the second count, on the ground that the mistake in the particulars was one by which the defendant could not be misled.

Ib.

Assumpsit for money paid to the defendant's use, and on an account stated. Plea, that at the time of the accruing of the cause of action, the plaintiff and defendant carried on business in copartnership, and that the causes of action arose out of *transactions* between them as such copartners; and that at the commencement of the suit, the accounts of the partnership were not settled or any balance struck. The plea was held bad, on special demurrer; because, first, it did not distinctly state that the money was paid in respect of a partnership transaction; secondly, if it did, it amounted to the general issue; and thirdly, as pleaded to the account stated, it also amounted to the general issue. *Worrall v. Grayson*, H. 1836. 477

In an action of covenant against C. and B. his wife on an indenture of lease, the breach alleged was, that A. & B. (the lessees) did not whilst

the defendant B. was unmarried, nor did A. and the defendants after their intermarriage, within every third year of the first seven years of the term, paint, &c. To this breach the defendants pleaded that A. and the defendants did, within every third year, during the first seven years of the said term, paint, &c. On demurrer, assigning for cause that the plea proffered a different and larger issue than that tendered by the declaration, the plea was held bad. *Marshall v. Whiteside and Eleonor Victorine his wife*, H. 1836. 485

Trespass for breaking and entering three closes described by abutments. Plea, that *the said closes in which &c.* were the closes, soil, and freehold of one Legh, with a justification as his servants.

Replication, that before the said times when &c., and before the said Legh had any thing in the said closes in which &c., one R. T. and M. his wife, in right of the latter, one A. L. and one E. K. were seised in fee of and in two undivided parts of and in the said closes in which &c., and one A. R. was also then seised in fee of and in the other undivided part. The replication then set out a fine levied by the said R. T. and M. his wife of their parts &c. of and in the said closes in which &c. to one P. M. C. during the life of the said wife, by virtue of which fine the said P. M. C. became seised &c., and then alleged that the said P. M. C., A. L., E. K. and A. R. being so seised, afterwards and before the said Legh had any thing in the said closes in which &c., and before the said times when &c., demised to the plaintiff, who thereupon entered, and was possessed until the defendants wrongfully broke and entered &c. Rejoinder, traversing the seisin of R. T. and M. his wife, A. L., E. K., and A. R. in the said closes

in which &c., whereon issue was joined.

At the trial the plaintiff established her case as to two of the closes, but gave no evidence as to the third. Held, that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the third. *Pythian* (mis-spelt *Pythian*) v. *White and another*, H. 1836. 515

Date of recent act of parliament, 603n.

An admission on the face of one issue, cannot be used as evidence to prove or disprove another issue.

But where a particular fact was admitted by both parties throughout the trial, the court refused to grant a new trial, on the ground that the judge stated to the jury, that the fact so admitted was admitted on the record, and used such admission on the record in support of another issue. *Stracy v. Blake*, H. 1836. 528

One of the counts in an action of libel set out the following passage from a letter written by the defendant to a Mr. P.:—"I have reason to suppose that many of the *flowers* of which I have been robbed, are growing upon your premises," thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants, roots, and flowers* of the defendant, and had disposed of them unlawfully to P., and unlawfully placed them in P.'s garden. The former part of the letter stated, that the plaintiff, whom P. had then in his employment as a gardener, had been discharged from the service of a Mrs. N. and the defendant for dishonesty:—Held, on error, that the innuendo referred to the whole passage of the letter and not to particular words, and that it was not too large. *Williams v. Gardner*, H. 1836. 578

Case against a sheriff for a false turn of *nulla bona*. The declaration alleged that the defendant seized and took in execution the goods and chattels of the value of the monies directed by the *fi. fa.* levied; and then levied the *thereout*. Plea, that the defendant did not seize or take in execution any goods or monies, and levied the monies so directed to be levied by the said writ in the declaration mentioned, or any part thereof, *modo et formá*:—Held, that the plaintiff, in order to support his action, need not prove more than the declaration than the seizure of the goods; the plea was bad for considering too large an issue, by denying the matter alleged in the declaration, not in the disjunctive but in the conjunctive, which would make it necessary for the plaintiff to prove not only seizure of the goods, but levy of the money out of them. *Stubbs v. London and another*, T. 1836.

Trespass against bailiffs for breaking and entering plaintiff's dwelling house, and assaulting and falsely imprisoning him.

Plea: first, not guilty; secondly, as to all the trespasses alleged (except the breaking the house) justification under a *ca. sa.* warrant thereon, by virtue whereof the defendants entered the house, the outer door being open, and arrested the plaintiff.

Replication, admitting the warrant, and alleged the trespasses to be committed by the defendants *de injuriâ sua propriaque residuo causæ*.

The evidence was, that the defendants, in execution of the warrant, broke open the outer door of the plaintiff's house and arrested him there; the jury were directed that as the justification was fully proved, they might give

images for the whole trespasses laid in the declaration.

Held, first, that the outer door being open was a condition precedent to the defendants' right to enter and arrest the plaintiff in his house, and that the averment in the plea was therefore material and necessary, so that it was properly traversed in the plea by the general replication *de injuriâ*, without any necessity to reply the breaking the outer door as an excess or an abuse of authority.

Held also, that notwithstanding the warrant, the defendants had become trespassers *ab initio* by breaking the door, and therefore that the direction was right, even on the plea of not guilty only. *Kerbey v. Edward and William Denbey Warren, and Western*, E. 1836.

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In trespass for assault and false imprisonment, the defendant pleaded that the plaintiff attempted forcibly to break and enter the messuage or public-house of the defendant without his leave, whereupon the defendant resisted such entrance, and because the plaintiff behaved himself violently and created a disturbance in the street, by which means *a mob was assembled*, and the defendant's business interrupted, and his customers annoyed, and because the plaintiff *threatened to continue* such violent conduct, and *to renew* his attempts and efforts to get into the house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his attempts and efforts was complied with, the defendant, *in order to preserve the peace and to secure himself from a renewal of such attempts and efforts*, gave the plaintiff in charge to a constable to be carried before a justice, who discharged him. The plea was held good after verdict, for it must

have been supported at the trial by proof that there was danger of a renewal of the breach of the peace originally committed in attempting to break into the house. *Ingle v. Bell*, E. 1836. 801

A bond of indemnity recited in its condition a deed of dissolution of partnership between the plaintiff and *I.*, in which deed was recited an agreement between them, that "*subject to the taking and adjustment of the copartnership accounts, as therein mentioned,*" all the stock in trade and partnership effects should belong absolutely to *I.*, and all the debts due from the partnership should be paid by him, and that he, and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts. The condition of the bond then proceeded to bind *I.* and the defendant, or one of them, to indemnify the plaintiff against the payment of the said partnership debts, and all costs, &c., and all actions to be brought in respect thereof. A declaration on this bond stated, by way of breach of the condition to indemnify the plaintiff, that *M.* having arrested the plaintiff for a partnership debt due by him and *I.*, the plaintiff justified bail, and afterwards surrendered in their discharge for the amount of a verdict obtained against him by *M.*, and remained in prison till his discharge by supersedeas, after incurring expenses in procuring special bail, and suffered injury from the imprisonment.

Plea, that the plaintiff, if damaged, was damaged by his own wrong.

Held, first, that on this issue the deed of dissolution of partnership could not be read in evidence for the defendant, in order to show that the plaintiff had not perform-

ed a covenant by the plaintiff to adjust the partnership accounts within seven days after the execution of the deed, and that he had not paid over to *I.* a balance which he claimed to be due to him on such adjustment; and, secondly, that the defendant was not entitled to show that the bill of *I.*'s attorney was much less than that of the plaintiff's, for defending the same action. *White v. Ansdell*, E. 1836. 785

Debt for 20*l.* for a boat sold and delivered by the plaintiff to the defendant. Pleas, first, *nunquam indebitatus*; secondly, as to 17*l.* 10*s.* parcel of the said sum of 20*l.*, that the action as to the said sum of 17*l.* 10*s.* was brought to recover that sum, as being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 10*l.* was parcel; such sum of 57*l.* 10*s.* being the price of the said boat sold and delivered by the plaintiff to the defendant: that the plaintiff at the time of the sale warranted that the boat was sound, and that the defendant confiding in such promise bought it on the terms aforesaid, and then paid to the plaintiff the sum of 40*l.* in part and on account of the boat. The plea went on to aver, that the boat at the time of the sale and warranty was unsound, and was not then worth more than the 40*l.* which had been and was so paid to the plaintiff for the same; and that the defendant incurred above 17*l.* 10*s.* expense in putting her into a sound state:—Held, that as this plea showed that the plaintiff had never been indebted to the defendant in more than the difference between the 40*l.* and the real value of the boat, the 40*l.* having been paid contemporaneously with the purchase of the boat, the plea was bad, on special demurrer, as amounting to the

general issue. *Dicken v. Neale*, T. 1836. 878

Where a plaintiff proceeds against more than one defendant on a count on which it turns out that only one defendant can be liable, held, that he is bound to elect the person against whom he will proceed, as soon as he has closed his own evidence. *Lyon v. Tomkins and others*, E. 1836. 811

A plea can only be applied to the breach of contract alleged, and not to the special damage laid as resulting from such breach. Thus a breach that a ship, when she sailed on a voyage, was not tight, staunch, strong, or fitted for the voyage, and though she set sail on the voyage, yet by reason of her not being so tight, &c., when she so sailed, was afterwards obliged to put back, and did put back and go to a port named, and was by reason thereof detained at *Altona* for a long time; and although she again set sail, and proceeded on her voyage, yet she did not proceed on it according to the due course thereof &c., or with the dispatch which she ought to have used &c., by means of which several premises the plaintiff sustained the loss of a homeward cargo, is not answered by a plea that, as to so much of the declaration as relates to the ship being detained in the port named, beyond the time necessary and requisite to put ballast on board, she was not detained there "by reason of her not being tight &c." *Porter v. Izat*, E. 1836. 639

Nor can a plea confess the whole of a breach alleged, and then offer to pay into court a sum in satisfaction only of a part first described in the plea, and not of the whole consequences of the detention alleged in the declaration by way of special damage. Thus, a plea of

payment of one shilling into court as to so much of a declaration as related to the vessel not being fitted for the said voyage, and by reason thereof being obliged to put back, and go to a port named, and being detained there for a short time, that is to say, "such time as was necessary and requisite to put a further quantity of ballast on board thereof," was held bad, even if the detention and delay &c. amounted to a breach, or were more than special damage. *Semble*, it was also bad, for setting up to answer what was not alleged in the declaration. S. C.

In an action of *indebitatus assumpsit* for work and labour and money paid, defendant pleaded that the work and labour was done under an agreement between the plaintiff and defendant, that the plaintiff should bestow his work and labour in endeavouring to secure the defendant's return as a member of parliament, without being entitled to demand of or from him in respect thereof any remuneration except such sums as the plaintiff should disburse in and about that object; and that there was no agreement between them relating to the amount of the remuneration to be received by the plaintiff from the defendant; but that a fair remuneration for the plaintiff's labour would not exceed 90*l.*, (as to which the defendant had pleaded payment into court.) Held, on special demurrer, that the plea was bad, as amounting to the general issue. *Jones v. Nanney*, E. 1836. 634

Semble, the special agreement might be given in evidence on the general issue non assumpsit.

Where an injury results partly from an act of trespass, and partly from an act which is not a trespass, if both acts are done together the plaintiff may maintain either an

action of trespass, or an action on the case, alleging the consequential damage. *Wells v. Ody*, E. 1836.

715

Covenant in an indenture of partnership between the plaintiff and defendant, that the business should be carried on during the copartnership in the defendant's house. Breach, that the defendant did not permit the business to be carried on at the said house, but improperly closed the same, and hindered the plaintiff and their joint customers from having access thereto. Demurrer, assigning for cause, that it did not appear from the breach, that the premises were closed at proper and seasonable times. Held, well assigned. *Hodges v. Gray*, H. 1836. 246

Whether a plaintiff, by taking issue in his replication on one only of several facts stated in a plea, admits the rest for any purpose besides that of pleading, on the record, *e. g.* for the purpose of considering them at the trial as if they had been actually established by testimony, *quære*. *Noel v. Boyd*, M. 1835. 211

The form of plea to debt on simple contract, provided by *Reg. Gen. Hil. 4 W. 4.*, that the defendant never was indebted in manner and form as in the declaration alleged, must be adhered to in terms, or the plaintiff will have judgment on demurrer. *Smedley v. Joyce*, M. 1835. 84

In debt on bond. 1016

POSSESSION OF SHAFT.

How proved. 746

PRACTICE.

(*Striking out Counts.*)

Assumpsit for toll of coals imported into the port of *Truro*. The declaration contained two counts, the

one claiming the toll as a metage duty, and the other as a port duty. Held, that these counts were for the same subject-matter of complaint within the meaning of the rule of *Hil. T. 4 W. 4. No. 5.*; and the court made a rule absolute for striking one of them out, unless, on a reference back to the judge at chambers, he should exercise the discretion given him by the rule, and allow both counts, upon the plaintiff undertaking to give distinct evidence in support of each. *Jenkins v. Treloar*, H. 1836.

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(*Time for pleading—Demand of Plea.*)

After signing judgment for want of a plea a plaintiff will be taken to have treated the plea as a nullity for all purposes, and cannot afterwards treat it as merely irregular, so as to avail himself of it as a waiver of his own mistake in not demanding a plea before he signed judgment for want of a plea. *Hough and others v. Bond, a prisoner*, E. 1836.

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A defective plea being delivered, judgment was signed for want of a plea after the time for pleading was out, and before the delivery of a good plea. A rule to plead had been given ascribing a wrong name to the plaintiff. The court treated the case as if no rule to plead had been given, and held the judgment irregular. *Warne v. Beresford*, M. 1835.

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An indefinite time to plead will not be granted on the ground that the defendant could not safely plead till a rule pending in another court and involving the same matter of defence is determined; but the court granted time to plead, fixing a certain day. *Clarke v. Allbut and another*, M. 1835.

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Cannot be pleaded.

See WALES.

PREScription ACT

2 & 3 W. 4. c. 71. see 37

PRISONER.

The words "to the satisfaction of such court," in 48 Geo. 3. s. 1., mean that the court is satisfied that the prisoner has been in prison for twelve months and a debt not exceeding 20*l.*, after not relating to those facts, cannot be urged against the petition for his discharge. *B. Clarke*, M. 1835.

A debtor who has been in custody for a year for less than a year cannot be discharged from custody, under 48 G. 3. c. 71, without annexing to his petition a copy of the causes in which he is in custody, verified by the proper officer. *Short v. Wallis*, 1835.

PRIVILEGED COMMUNICATION.

See LIBEL.

PRIVY COUNCIL.

The defendant in a suit in the High Court of London, who gave an answer, under protest, to a writ of habeas corpus, and whose protest was overruled, but whose petition for a writ of habeas corpus was refused to compel her to appear absolutely, or to admit the libel. She appealed to the Court of Arches, but without success, not having done so in due time. Her further appeal to the House of Delegates was disallowed, and the cause was remitted to the High Court, which after refusing to correct her libel, refused to admit additional articles brought in by her. She appealed from that decision to the Court of Arches, which pronounced in her favour. Against the decision of the Court of Arches, the defendant

ant appealed to the king in council. The judicial committee of the privy council, to which it was referred, in pursuance of 3 & 4 *W. 4. c. 41. s. 3.*, reported in favour of the defendant's appeal, that the decree of the Court of Arches ought to be reversed, and the principal cause retained by the Consistory Court, and that the defendant should appear there absolutely. This report was confirmed by the king.

On motion by the defendant to this court for a prohibition to the judicial committee :—Held, that that tribunal had jurisdiction over the cause as well to retain as to remove it; and that the act complained of, if wrong, was a step taken in the cause, and related to a matter of practice, which could not be the subject of a prohibition from this court. *Ex parte Smyth*, M. 1835. 222

Semble, that the court has power to issue a prohibition to the judicial committee, if they exceed their jurisdiction. *Ib.*

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REPRESENTATION, FALSE.

By 9 *G. 4. c. 14. s. 6.* no action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given concerning or relating to the character,

4 G

conduct, credit, *ability*, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (a)—unless such representation or assurance be made in writing, signed by the party to be charged therewith. The plaintiff was about to lend money to T. on the purchase of an annuity, proposed to be secured by an assignment of his life interest in a particular trust-fund. The trustee of the fund being applied to to inform the plaintiff as to the existing state of T.'s life interest in it, and what incumbrances then affected it, replied verbally, that of six annuities which had been secured by T. on this fund, three had been paid off and discharged in the involment office, and that the other three still existed; but that, subject to the above, he, the trustee, had no notice of any other charge on it. At the time this representation was made, T.'s life interest in the trust-funds had been transferred to the party who had discharged three of the six annuities, subject to payment of the other three. The plaintiff advanced the money to T., who did not repay it. An action having been brought against the trustee for false representation, the plaintiff was nonsuited; and the court was equally divided in opinion. Whether, since 9 G. 4. c. 14. s. 6., the defendant was liable for his representation of T.'s *ability*? it not having been made in writing and signed by the defendant. *Lyde v. Barnard*, H. 1836. 250

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SALE OF GOODS.

See GOODS SOLD AND DELIVERED BY VENDOR AND PURCHASER.

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SERVICE OF PROCESS

The service of process need not be personal to entitle a plaintiff to enter a common appearance against a defendant under 12 G. 1. c. 1., if circumstances be shown to the court from which it may fairly be inferred that the defendant got the writ. *Williams v. Phipps*, T. 1836.

SET-OFF.

A cargo of goods was consigned to factors to sell, who on the 1st of February sold one parcel to the defendant, and delivered him an invoice in their own names. On the 13th the defendant applied to purchase another parcel, whereupon the factors said they must wait for their principals. Some days afterwards they informed the defendant of the answer of the principals, and on the 20th the defendant brought

a second parcel at the price named by them, and thereupon the factors delivered to him an invoice and a bought note in the name of such principals. The goods were to be paid for at four months in cash. On the same day, and on several occasions afterwards within the four months, the defendant made payments to the factors, but not expressly on account of the goods in question. It was proved, that the practice of the factors, when they sold goods on their own account, to pay advances made by them, was to deliver an invoice in their own names, but when they sold merely as brokers to deliver a bought note. The owners of the goods having brought an action against the defendant for the price of the parcel sold on the 6th of *February*, the jury found that the factors communicated to the defendant the fact, that they sold the goods for other persons as principals, but that the defendant, on the 6th, and until the 20th of *February*, *bonâ fide* believed that they sold to pay themselves advances; and that the defendant, using the ordinary precaution of merchants, was not bound to make further inquiry:—Held, that the defendant was entitled, as against the plaintiffs, to set off the payments which he had made to the factors. *Warner and others v. M'Kay*, T. 1836. 965

Since the rules of *Hilary* term 4 *W.* 4., a defendant is not entitled to give evidence of a set-off, under a notice of set-off delivered with the plea *nunquam indebitatus*, for the proviso in the 3 & 4 *W.* 4. c. 42. s. 1. restraining the judges from depriving parties of the power of pleading the general issue, and giving the special matter in evidence, does not apply to the case of a set-off, so as to prevent the judges from requiring by the

new rules that a set-off shall in all cases be pleaded. *Graham v. Partridge*, E. 1836. 754

SHERIFF.

Where a sheriff had taken a bail-bond with only one surety, and being ruled to return the writ on the 15th, did not return it until the 16th; the court set aside an attachment which had been issued against him for not returning the writ. There seems to be a distinction where a sheriff has been ruled to return the writ, and where to bring in the body: in the latter case he will be fixed if he had taken a bail-bond with only one surety, but not in the former. A court, on setting aside an attachment against the sheriff, will allow to the plaintiff any injury he may sustain by the default of the sheriff. *The King v. The Sheriff of Surrey, in a cause Howell v. Young*, M. 1835. 32

A defendant became bankrupt, and a fiat issued against him after his goods had been taken in execution by the sheriff. The assignees and the sheriff made an agreement as to the disposal of the goods: Held, that the bankrupt could not compel the sheriff to return the *fi. fa.* *Gilbert and another v. Matthew and Thomas Whalley*, M. 1835. 189

An attachment having issued against a sheriff, for having by mistake omitted to return a *capias*, pursuant to a baron's order in vacation, under *Reg. Gen. M.* 3. *Will.* 4. No. 13. till half an hour after the opening of the office on the day after the proper return day, the court set it aside, though bail above were not perfected, on payment of costs and of such further damages, if any, as the master might find the plaintiff to have sustained from the sheriff's omission. *The King v. The Sheriff of Essex, in a cause of Fitch v. Courtenay*, E. 1836. 629

A sheriff may move to set aside

an attachment against him, after it has issued to the coroner. *The King v. The Sheriff of Essex, in a cause of Fitch v. Courtenay*, E. 1836. 629

Where a plaintiff intends to make a sheriff liable for damages occasioned by his not having returned a writ of *capias* in proper time, he should, if in vacation, give him notice of his intention, and will then be entitled to recover all such damages as occur between his giving such notice and receiving information from the sheriff that the defect is cured. *Ib.*

The plaintiff being in the custody of the marshal, was brought up by that officer to the Court of King's Bench on an order of that court, obtained by the defendant, and which had been lodged with him. He was there committed to the same custody on an attachment for non-payment of costs, and detained accordingly: Held, that he could maintain trespass against the defendant who had caused the order to be lodged with the marshal, so as to call on the defendant to justify under the process. Lord Abinger C. B., *dissentiente*. *Bryant v. Clutton, Gent. one &c.* E. 1836. 843

Seemle, a sheriff is liable in trespass for arresting a person on process in which he is wrongly named.

Ib.

The defendant was arrested on the 26th October, and deposited the amount of the debt and 10*l.* for costs, with the sheriff in lieu of bail, under the 43 Geo. 3. c. 46. s. 2. On the 10th November the sheriff was ruled to return the writ, and on the 17th his agent filed a return, stating the arrest and deposit of the money, and that it had been paid into court. Owing to an inadvertence in sending up the writ without the money it had not been so paid, and in consequence of the absence of the under-sheriff from home, it was not paid in pre-

vious to the 23d, on which the plaintiffs commenced an action against the sheriff for a false return. The sheriff having obtained *nisi* why he should not be at liberty to pay the money into court why it should not remain in court as though it had been paid in time, the court made the rule absolute on payment of costs.

On the 20th November a judgment order had been obtained against part of the defendant in the following terms: "I do order that the defendant shall be at liberty to enter into court the sum of 10*l.*, with the sum of 94*l.* 7*s.* 11*d.* for costs, deposited with the sheriff of Carnarvon in lieu of the writ, and returned as paid into court, the amount required to be deposited by the statute of the 7 & 8 Geo. 4. c. 2., to abide the event of the writ in lieu of perfecting bail. And further order that the said defendant enter a common appeal forthwith." On the same day the defendant paid 10*l.* into court, and entered a common appeal, but the money deposited with the sheriff was not paid into court. On the 16th January the defendant demanded a declaration. Held, that the plaintiffs were not obliged to proceed until they obtained payment, which was equivalent to special bail. The court set aside the declaration with costs. *Hawthornes, executors, v. Champney and another*, H. 1836.

An issue was delivered framed for trial at *nisi prius*, and the plaintiff afterwards got an order for trial before the sheriff without taking a summons to amend the form of the issue, and served the order on the defendant with notice of trial. Held, that the issue, service of the order, and notice of trial, should be set aside for irregularity, the issue not having been made and amended in the form of an is-

be tried before the sheriff. (3 & 4 Will. 4. c. 42. s. 17.) *Ward v. Peel*, T. 1836. 1135

A rule to set aside an attachment against the sheriff for not bringing in the body was discharged, it appearing that the defendant had not rendered, and that bail had not been put in so as to be ready to justify on disposing of the rule, and the court refused to set aside the attachment on the terms of paying costs and rendering the defendant in a country cause in four days. *Rex v. Sheriff of Lincolnshire in Burton v. Gee*, M. 1835. 92

In a cause tried before the sheriff under a writ of trial, it is not necessary in applying for a new trial to state the pleadings in the affidavits, for the writ of trial, like the *postea* in an action which has been tried before a judge, is assumed to be in court. *Milligan v. Thomas*, M. 1835. 134

A sheriff need not deny collusion in order to obtain relief under the interpleader act. *Boond v. Woodall*, M. 1835. 11

Duty as to *capias*. See WRIT OF CAPIAS.

Pleading in false return by. See PLEADING.

See BAIL—WRIT OF TRIAL.

SHIP.

See *Porter v. Izatt*. 639
See PLEADING.

SHORT-HAND NOTES.

See COSTS.

SIMILITER.

Adding. 924

SLANDER.

The first count of a declaration for slander, after averring that the plaintiff was possessed of a barley stack, and had insured the same from fire in a certain insurance society, and that the stack was burnt

without the default of the plaintiff, laid the slander as follows: “*West* (meaning the plaintiff) is as likely a man as any one to set fire to his own barley stack.” “A Tom and Jerry shop is to be opened in my (meaning the defendant’s) parish, and the sign I (meaning the defendant) shall have painted, is a barley stack on fire with a man in the middle of it,” (thereby meaning that the plaintiff had unlawfully, wilfully and feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the statute.) There was a second count on the following words, “*West* set fire to his own barley stack,” with a similar inuendo to that contained in the first count. The declaration concluded by alleging special damage. *Semble*, on demurrer, that the declaration was bad. *West v. Smith*, E. 1836. 825

In a declaration for slander of the plaintiff’s title to property, alleging special damage, the words must be set out in the declaration, so as to afford the defendant an opportunity to admit the uttering of the words, and then to bring before the court the question, whether their effect was slanderous or not. *Gutsole v. Mathers*, E. 1836. 694
See PLEADING.

SMUGGLING.

See CUSTOMS LAWS.

SOLVIT POST DIEM.

See BOND. 1021, n. (a)
Ashbee v. Pidduck. 1016

STAKES.

Recovering before paid over. 931

STAMP.

An action was brought to enforce a

contract for the purchase of certain shares in a mining company, and while such action was pending the attorney for the plaintiff wrote to the defendant's attorney to inform him that a call had been made upon the shares, and requesting to know whether the defendant would authorize the plaintiff to pay the amount required, to avoid a forfeiture of the shares. The defendant's attorney wrote back authorizing the plaintiff to do so: Held, that these letters did not require an agreement stamp, pursuant to 55 Geo. 3. c. 184. *Parker v. Dubois*, H. 1836. 243

An agreement, bearing date in May 1831, was made between A., B. & C., whereby A. & B., who were tenants in common of an estate, agreed to sell it by auction, and after the 1st August, and before the 1st September, to divide such part of it as should not be sold: and it was further agreed, that upon such sale and partition 100*l.* should be paid to C., who was the principal tenant of the estate, upon his giving up his farm at the ensuing Michaelmas, and who agreed to give up his farm accordingly. No part of the estate was sold by the 1st August, but some portions of it were disposed of subsequently, and the remainder was divided between A. & B., but the partition was not effected until March in the following year; up to which period, C., at the desire of A. & B., continued in possession and then quitted: Held, that the agreement did not amount to a surrender by C. of his term, and that it was properly stamped with an agreement stamp. *Weddall v. Capes*, H. 1836. 430

An action being ready for trial at the assizes, an agreement was entered into that the cause should be postponed until the next assizes, upon the defendant in that action, and

the present defendant, who was attorney, giving to the plaintiff a promissory note, which was given up in case the plaintiff failed in that action, but if she obtained a verdict it was immediately enforced. The note was accordingly made to the plaintiff payable on demand, and it was signed, a memorandum indorsed upon it, stating, that the note was given upon the consideration mentioned in the agreement: that the indorsement was merely marking of the note in order to identify it, and that such indorsement was not part of the note, as to incorporate the agreement with it, and render it an agreement requiring an agreement stamp: *Brill v. Crick*, H. 1836.

A horse of the plaintiff having been killed by falling down an old shaft of a mine which had been covered over for a number of years, the plaintiff charged the defendant with being in possession of the shaft, and that it belonged to a mine of his called *Or Close Mine*. The defendant denied that the shaft belonged to him, but added, that if a miners' jury were called and said it was his, he would pay for the horse.

A miners' jury being called and found in writing that the shaft belonged to the defendant's.

Held, in an action on the case to recover compensation for the horse, that such finding of the jury, coupled with the defendant's declaration, was admissible in evidence against him to prove he was in possession of the shaft. *S. v. White*, E. 1836.

Held, also, that as the document did not appear on the face of it to be an award, it did not require an award stamp. *Ib.*

In the absence of evidence that the instrument, e. g. a note bearing an agreement stamp at the time it was produced in evidence, and requiring to

stamped at the time it was signed, in order to its being admissible in evidence, was not so stamped at the time it was signed by the party, the court will assume that it was stamped before it was so signed. *Wheatley v. Williams*, T. 1836.

1043

A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp under 55 Geo. 3. c. 184. *Doe d. Wheble & Kinnear v. Fuller*, M. 1835.

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An agreement to make a printing press is within the exemption in the Stamp Act 55 Geo. 3. c. 184. Schedule tit. Agreement, relating to the sale of goods, and does not require a stamp. *Pinner v. Arnold and another*, M. 1835.

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SYMOND'S INN.

Is in Middlesex.

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TENDER.

The plaintiff's attorney wrote to the defendant, saying, unless the plaintiff's debt, together with his (the attorney's) charge for the letter, were paid at his office on the following *Wednesday* at twelve o'clock, proceedings must be immediately commenced. About ten o'clock on the *Wednesday* a clerk of the defendant went to the attorney's office, where he saw a clerk (a boy) to whom he tendered the amount of the debt. The boy having referred to the letter book, refused to receive the debt unless the charge for the letter were also paid. At eleven o'clock the attorney issued the writ. Held, (*Parke B. dubitante*) that the tender was good. *Kirton v. Braithwaite*, T. 1836. 945

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See LANDLORD AND TENANT.

THEN THE.

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TIME TO PLEAD.

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TRESPASS.

The plaintiff being in the custody of the marshal, was brought up by

that officer to the court of King's Bench on an order of that court, obtained by the defendant, which had been lodged with him. He was there committed to the same custody on an attachment for non-payment of costs, and detained accordingly. Held, that he could maintain trespass against the defendant who had caused the order to be lodged with the marshal, so as to call on the defendant to justify under the process. Lord *Abinger C. B. dissente*. *Bryant v. Clutton, Gent. one &c. H.* 1836. 843

Semble, a sheriff is liable in trespass for arresting a person on process in which he is wrongly named. *Ib.*

Where a plaintiff recovered 13s. damages in an action of trespass *quare clausum fregit*, to which only the general issue was pleaded, it was held that he was entitled to his full costs as under that plea, as restricted by the rules of pleading of *Hil.* term 4 *W.* 4. the freehold could not come in question, so that the judge might certify under 22 & 23 C. 2. c. 9. s. 136., in order to insure to the plaintiff his costs. *Hughes v. Hughes, M.* 1835. 4

TRIAL, NOTICE OF.

A defendant was arrested in *London* on a bill of exchange, accepted a notice to plead in four days, but was in *Ireland* at the time that eight days' notice of trial was given to his attorney in *London*. After verdict against him in *London*, the defendant obtained a rule nisi for a new trial, on the ground that his residence was then and had been for some time past in *Cork*, and therefore that he was entitled to fourteen days' notice of trial. On showing cause, the court dis-

charged the rule, the affidavit on which it was granted not stating where the defendant generally lived, or that he was temporarily and not permanently resident in London at the time of the arrest. *Lencham v. Gould*, M. 1835. 228

Countermand of notice of trial may be given either by the attorney in the country, or by his agent in town, who is the attorney upon the record. *Cheslyn v. Pearce*, H. 1836. 238

Effect of countermanding in time, *Doc v. Owen*. 944

TROVER.

Trover may be maintained by a gratuitous bailor of cattle against a wrong-doer, who has taken them out of the bailee's possession.

Trover for cattle, goods, and chattels. Plea as to all the cattle mentioned in the declaration, that one H. had fraudulently sold them to the plaintiff. Replication, that H. had not fraudulently sold them to the plaintiff, on which issue was joined. The plaintiff in his particulars limited his claim to one cow. The jury found that H. had made a fraudulent sale of his effects, but that the cow was the property of the plaintiff, and was not sold by H. Held, that the verdict should have been entered for the plaintiff. *Nichols v. Bastard*, M. 1835. 156

TRUSTEES.

Costs of. 160

VENDOR AND PURCHASER.

Goods were consigned to A. in London. On the arrival of the vessels in the river, the captains being urgent that the goods should be taken out, applied to A., who was then insolvent, and who at first refused to give any directions, but ultimately, to accommodate the

captains, gave his son an order to land the goods at where he had been in the landing goods under written at the same time declaring he would not take the question. A. had no premises of his own on the river, but a warehouse in the city. The goods were landed on the wharf as usual, and while in the hands of the wharfingers were stolen *transitu*, shortly after which the wharf became bankrupt.

Held, in trover by the plaintiff against the wharfingers, that the proper question to be put to the jury was, whether the wharfingers took possession of the goods for A. as owner, or for the benefit of the vendor. *James and others, assignees of Arthur Wilson, a bankrupt, v. Griffin and house*, H. 1836.

Held also, that the decision made by A., that he would accept the goods at the time he gave his son orders to land them, was admissible in evidence, though it was not communicated to the wharfingers or the vendor. *Ib.*

Goods were forwarded from London by K., a carrier, directed to the plaintiff at Douglas, in the Mersey, "care of D. (the defendant) Brunswick Street, Liverpool. The goods were landed at a wharf in Liverpool by K., and on the same day sent a notice of arrival to the defendant, and the latter, at the time the notice was delivered, signed an acknowledgment that the goods in question had arrived for the plaintiff. The defendant also entered them for clearance and manifest of a bill of lading about to sail for the Isle of France, but never sent for them until the sixth day after their arrival, when they were not to be found. It was proved that on former

sions when *K.* had brought goods consigned to the defendant, he had desired them to be left on the wharf until he sent for them.

Held, in an action on the case against the defendant for not taking proper care of the goods in question, that there was evidence to go to the jury of a delivery to and acceptance by him of such goods.

Quiggin v. Duff, H. 1836. 553

In an action for not accepting oil bought by the defendant of the plaintiff, the defendant relied on the variances between the following bought and sold notes. The bought note addressed to the defendant ran thus: "We have this day bought for your use from *B.* (the plaintiff) 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash, at fourteen days from delivery, less 2½ per cent. discount. The above oil to be delivered from the *Speedy*," or "*Charlotte*, expected to arrive about *November* or *December* next." The sold note addressed to the plaintiff stated as follows: "We have this day sold for your use, payment in fourteen days by cash, less 2½ per cent. discount from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, ex *Speedy*," and "*Charlotte* to arrive." Held, that the apparent variances between these notes might be explained by evidence of the mercantile usage respecting them, and that it being shown that by such usage the buyer was bound to take the oil from either ship, whenever she arrived, and that the words "expected to arrive" were mere representation, and not part of the contract, the variances were immaterial, and did not rescind it.

Bold v. Rayner, E. 1836. 820

Certain leasehold houses were sold

by auction, and were described in the particulars and conditions of sale, as a well secured rental with a reversionary interest, and as a safe and desirable investment. The premises in question were liable to be taken for the purposes of the *South London Market Company*, under the provisions of a local act.

The particulars and conditions of sale gave no notice of this liability, and at the trial the jury found that the vendee had no notice of the act of parliament. In point of fact, the conditions contained no express warranty of title. In an action by the purchaser against the vendors, held, that the first count of the declaration stated the contract too largely, in setting it out as an undertaking by the defendants, that they had good title to sell the property free from all incumbrances and liabilities.

Held also, that the purchaser, on ascertaining that the liability to which the premises were subject, had a right to rescind the contract, and was entitled to recover back his deposit under the count for money had and received. *Ballard v. Way and another*, E. 1836. 851

Effect of agreement to purchase.

1065

VENUE.

Venue will not be changed in a local action on special grounds, under 3 & 4 *W.* 4. c. 42. s. 22. till after plea pleaded. *Bell v. Harrison*, M. 1835. 193

Where in an information in intrusion the venue is laid in the county in which the land lies, the court will order it to be tried in another county without changing the venue, on suggestion by the Attorney-General of facts showing danger

that an impartial trial cannot be had in the first county. *Attorney-General v. Parsons*, T. 1836. 980

Resemblance of such an information to trespass. *Ib.*

VERDICT PERVERSE.

See NEW TRIAL.

VESTRY.

By the *St. Pancras Vestry Act* (59 Geo. 3. c. 39. s. 19.) the vestrymen (whose continuance in office is not limited to any particular period) are empowered to appoint the subordinate officers, and to remove them at their pleasure, and such officers are by s. 57, to give bonds to the directors of the poor (who are annual officers) for the faithful discharge of their duties.

Held, that subordinate officers so appointed are not annual officers, and that the bonds given by them to the directors of the poor are not determined by the latter going out of office. *M'Gahey, Vestry-Clerk of Saint Pancras, Middlesex, v. Alston and another*, E. 1836. 705

VESTRY CLERK.

In an action brought by a vestry clerk of a parish, under a clause in a local act, by which the directors and overseers of the poor were to sue and be sued in the name of their clerk, the defendant pleaded that the plaintiff was not vestry clerk. Held, that proof of his having acted as vestry clerk was sufficient *prima facie* evidence of his being regularly appointed such clerk. *M'Gahey, Vestry Clerk of Saint Pancras parish, v. Alston and Sewell*, T. 1836. 981

One of the directors of the vestry was called for the plaintiff, to prove that he had examined certain accounts rendered by the defendant, but had never allowed

them. Held, that he was a competent witness, though one of the real plaintiffs, not being personally liable to costs. *Ib.*

WAGES.

Apportionment of.

WALES.

The proper mode of procuring a writ from the superior court at *Westminster* is to exercise the discretion vested in the court by them by sect. 14. of 11 G. 4. c. 70., of adopting the practice of any court of Session, &c. abolished by the Act of 1833. It is by motion. The practice of such a court, before its abolition, by that act, cannot be pleaded in an action of *scire facias* on a writ of *certiorari* to a writ recovered therein. *H. and others v. Bowers*, M. 1833.

WARRANT OF ATTORNEY.

The defendant had obtained a writ nisi to set aside a warrant of attorney dated the 1st August 1815, on his own affidavit, that when he gave it "he was an infant of the age of 20 years or thereabouts," and on proof of his registration of baptism, dated the 3d of September 1815. The court discharged the rule, holding that the infant had not been sufficiently proved out. *Weaver v. Stokes*, H. 1833.

WATERCOURSE.

A claim by the occupier of a coal mine to sink pits in his own land for the water pumped out of the mine, and for the precipitation of the copper contained in the water, and for that purpose to run iron into the said pits and to mix the same with the said water, afterwards to let it off, impregnated with metallic substance into a watercourse flowing over the land of another, is a claim

a watercourse within the second section of the 2 & 3 W. 4. c. 71. *Wright and another v. Williams and others*, H. 1836. 375

In a plea under that statute, it is sufficient to aver a user of the right for forty years *next before the commencement of the suit*, and it is not necessary to allege that it has existed for forty years before the act complained of in the declaration. *Ib.*

Where a replication to a plea of enjoyment of an easement for forty years, under the 2 & 3 W. 4. c. 71., sets up a life estate in order to bring the case within the eighth section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate. *Ib.*

WILL.

Last words in to operate. 891, n.

WITNESS.

See PAYMENT.

A rule nisi for a commission to examine witnesses, was obtained on an affidavit, which stated that the facts alleged in the pleas took place in the presence of the witnesses, that they resided abroad, and that their evidence was material and necessary. The affidavit was held sufficient, although it did not say that the evidence was admissible, or swear to merits, or aver that the application was *bona fide* and not for delay. *Baddeley v. Gilmore*, H. 1836. 369

The court, on making the rule absolute for the commission, refused to impose terms on the party by whom it was obtained. *Ib.*

A rule nisi was obtained for a commission to examine witnesses in *Jamaica*, founded upon an affidavit, stating that there were several persons residing in that island,

but whose names were unknown to the deponent, who were cognizant of the facts on which the issue was raised. The court discharged the rule, on the ground that the affidavit must either specify the witnesses by name, or otherwise describe them. *Gunter v. Mactear and others*, H. 1836. 245

WORK AND LABOUR.

By articles of agreement made between the plaintiff and the defendant, for altering and repairing a warehouse of the latter, it was stipulated that in the event of the work not being completed in three months, the plaintiff should forfeit and pay to the defendant the sum of 5*l.* weekly and every week he should be engaged in such work beyond the said period, such penalty to be deducted from the amount which might remain owing to the plaintiff on the completion of the work.

Held, in an action brought for extra work done to the same premises, that the defendant, who had paid the whole of the contract price, was entitled to set off the penalty against such extra work, the agreement giving him a two-fold remedy, either to deduct it from the contract price, or to recover it as a payment due to him. *Duckworth v. Allison*, E. 1836.

742

The value of materials cannot be recovered under a count for work and labour.

Debt in 10*l.* for work and labour, and on an account stated. Plea, as to all the sum demanded, except 7*l.*, *nunquam indebitatus*; as to the 7*l.* the defendant suffered judgment by default. At the trial the plaintiff proved materials provided to the amount of 8*l.* 4*s.*, and work done to the amount of 4*l.* 4*s.* 10*d.*, but gave no evidence applicable to the account stated:

—Held, that the defendant was entitled to a nonsuit. *Heath v. Freeland*, T. 1836. 918

WRIT.

Time of issuing. 675
Resealing. 674

WRIT OF CAPIAS.

Since the uniformity of process act, 2 W. 4. c. 39. a sheriff is bound to execute the writ of *capias* by arresting the defendant as soon after that writ is delivered to him as he can find opportunity, and cannot postpone the execution of it at all events till four months have elapsed.

But, *semble*, that he is not liable to an action for negligence in not arresting when he had an opportunity to do so, without proof of actual damage. Where such damage was admitted on the pleadings, for want of pleading the general issue, but no evidence was given to support the admission, the court reduced a verdict for 40*l.* to 40*s.* *Brown v. Jarvis, Sheriff of Hants*, T. 1836. 1033
Present duty of sheriff to execute. *ib.*
See SHERIFF.

WRIT OF SUMMONS.

The uniformity of process act, 2 W. 4. c. 39. schedule No. 1. requires that the defendant's actual or supposed residence should be stated in the writ of summons. A writ of summons described the defendant's residence as "*Symond's-inn, Chancery-lane*, in the city of *London*." A rule to set it aside for irregularity having been obtained, on an affidavit that no part of *Symond's-inn* is situate in the city of *London*, but in the county of *Middlesex*, the court discharged the rule. *Lewis v. Newton*, M. 1835. 72

A copy of a writ of summons was thus indorsed — "This writ was issued by *W. Loaden*, 32, Great *James-street, Bedford Row*, agent for the plaintiff in person, who resides at *Barmouth*:"—Held insufficient. *Lloyd v. Jones*, T. 1836. 915

The recital in a writ of trial of a particular day as that on which the writ of summons issued, (pursuant to Form 5. in *Reg. Gen. Hil. 4 Will. 4.*) is conclusive, and cannot be contradicted by parol evidence at the trial; but if a writ, in the first instance erroneous, is acted on by being served, and is afterwards altered and resealed behind the defendant's back, so as to defeat a tender made by him after it was first served, and before it was amended, the trial will be set aside, and the writ of trial amended on motion, by inserting the day on which the writ of summons was resealed. *Wippell v. Robert Manley*, E. 1836. 672

If the copy of a writ of summons in assumpsit, which is served on a defendant, omit the words "on promises," it is not a ground for setting aside the writ itself, but only an objection to the copy. *Chalkley v. Carter*, M. 1835. 210

WRIT OF TRIAL.

Issue having been joined on 22d *July*, the defendant took out a summons, calling on plaintiff to try before a sheriff in a fortnight, and a judge granted an order accordingly. The plaintiff took out a summons to rescind that order, and another order was obtained to try at the next court day:—Held, first, that the judge had no power to make such an order; secondly, that a motion for judgment as in case of nonsuit, in *Michaelmas* term, was premature; and, lastly, that that motion having been made on the faith of a judge's order, which was

overturned by decision of the court, the rule for judgment as in case of a nonsuit should be discharged without costs. *Wright v. Skinner*, M. 1835. 69

Semble, that when an application has been made to a judge at chambers for a writ of trial under the 3 & 4 Will. 4. c. 42. s. 17., and he has refused to make the order, that the court will not entertain the application, although the party might under the act have in the first instance come before the court. *Davies v. Lloyd*, M. 1835. 28

Where in an action of debt tried before the sheriff, the defendant was suffered to prove in reduction of damages a part payment of the

plaintiff's demand, though nunquam indebitatus was the only plea on the record, the court refused a rule for a new trial, on the ground that the objection was not made at the trial, and it was not sworn that the plaintiff was taken by surprise by the evidence admitted. *Wright v. Skinner*, H. 1836. 277

Semble, that where an action has once been tried before the sheriff under a writ of trial, the defendant cannot obtain judgment as in case of nonsuit, but defendant may move to discharge the order for the writ of trial, and take the cause down to the assizes by proviso. *Day v. Day*, H. 1836. 314





